This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

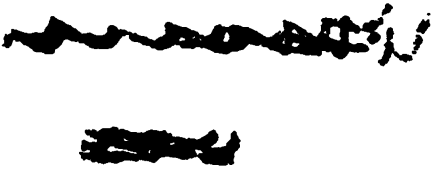
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

[redacted]

[redacted]

S[illegible]
Calgary
N.W.T.

Sept. 22nd 1890



DL
AOV
YU

A MANUAL

OF

Practical Conveyancing.

REAL AND PERSONAL PROPERTY,

INCLUDING WILLS,

WITH

PRECEDENTS, FORMS AND REFERENCES.

BY D. A. O'SULLIVAN, LL.B.,

BARRISTER-AT-LAW, OSGOODE HALL,

Author of "A Manual of Government in Canada."

TORONTO:

CARSWELL & CO., LAW PUBLISHERS,

26 AND 28 ADELAIDE STREET, EAST.

1882.

Entered according to Act of the Parliament of Canada, in the year one thousand eight hundred and eighty-two, by D. A. O'SULLIVAN, in the office of the Minister of Agriculture.

MOORE & CO.,
PRINTERS, 20 ADELAIDE STREET EAST,
TORONTO.

DEDICATED BY PERMISSION

TO THE

Honourable John Hawkins Hagarty, D.C.L.,

PRESIDENT OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

PREFACE.

In the following pages the writer has given all the prominence possible to a discussion of the law regarding the ordinary points that arise in Conveyancing, leaving the special conveyancer to find elsewhere what may suit his purpose. He has also devoted less space than is usual to forms and precedents, not because good precedents are not desirable, but because in courts of justice in the present day the rights of the parties under an instrument are decided, if possible, by the intention rather than the manner of expressing it. Even in conveyancing the magic of a set word or phrase is fast losing the importance it once possessed; and one may not be extravagant in expecting to see the time when parties will be bound by their intentions, no matter whether the formalities of contracts or conveyances have been disregarded or not.

In regard to the plan of this work, no English author has been followed, but such portions of the works of the best writers as are useful in this Province have been adverted to. The admirable works of Mr. Deane and Mr. Prideaux have been kept in view as to points of law—that of Mr. Greenwood as to practical instructions, and that of Mr. Hayes for precedents and otherwise. Almost every other writer of the two dozen or so on the shelves at Osgoode Hall have been referred to. In more than one subject use

has been made of the voluminous references of Mr. Addison. The chapter on Personal Property, it is hoped, will afford a connected view of the subject, and will refer to the latest authorities on the positions taken. The admirable work of Mr. Benjamin on Sales, and the works of Herman and Jones on Chattel Mortgages, have been frequently used, as also the elaborate work of Mr. Barron on our Revised Statute on the latter subject. It is the only chapter in which the writer relied on his own considerable experience in this part of the subject, and in some points insisted upon he is aware of not being quite in accord with several members of the Bar.

The writer was more likely to go astray from the excess of authorities than otherwise; and although positions taken in the work may not prove ultimately to be the law, it will not be because no authority can be found to support them.

The writer is under lasting obligations to several distinguished members of the Ontario Bar for the assistance he received in various parts of the following work; and though a reference to their names may raise higher expectations in these pages than may be realized, the reader might have been otherwise misled or disappointed if the assistance was not availed of. The fact that a work of this kind is capable of being, if necessary, written by several lawyers, and yet be not inconsistent, induced the writer to solicit assistance on disputed points in almost every chapter. Though it would be unfair to the gentlemen from whose opinions he has profited to rest the responsibility of everything in the book upon their shoulders, it can at least be said they have lessened the defects in the original manuscript. In an especial way, Mr. Moss, Q.C., in the first chapter, and Mr. S. H. Blake, Q.C., in the last—the Chapter on Wills—have taken great pains to improve the manuscript.

As may be expected, the first chapter was in many respects the most difficult to dispose of satisfactorily.

Mr. Maclennan, Q.C., called attention to several points in the chapter on Leases, which he went over very minutely; and the chapter on Titles was submitted to Mr. Rose, Q.C., for suggestions. Mr. Taylor, Q.C., extended the courtesy of reading over the chapter on Sales of Land, and made some notes for consideration; he also kindly allowed the writer the use of Gardenor's Directions for Drawing Abstracts, which have been referred to at length under the Precedents, Forms and References. In the same way the chapter on agreements was referred to Mr. Lount, Q.C., whose suggestions were incorporated into the text.

The indexes have been kindly prepared for the work by Mr. John B. Jackson, B.A., and Mr. Chas. L. Mahony, Students-at-Law—the latter having, on a previous occasion, done a similar task for the writer.

D. A. O'S.

December, 1881.

12 Elgin Avenue, Yorkville.

TABLE OF CONTENTS.

INTRODUCTORY CHAPTER..... 1-29

I. PRELIMINARY.
II. PARTIES:
1. The Crown.
2. Corporations.
3. Trustees.
4. Husband and wife.
5. Infants.
6. Lunatics.
7. Other disabilities.
III. SUBJECT MATTER OF THE CONTRACT AND LAW GOVERNING IT.
IV. SHORT FORMS OF CONVEYANCING.
V. RECITALS.
VI. DATE.
VII. DUPLICATE.
VIII. EXECUTION:
1. Signature.
2. Sealing.
3. Delivery.
IX. WITNESSING AND PROOF OF EXECUTION.
X. ALTERATION, CANCELLATION, ETC.
XI. REGISTRATION.

CHAPTER II..... 30-47

TITLE TO REAL AND PERSONAL PROPERTY.

I. REAL ESTATE.

I. PRELIMINARY.
II. SOLICITOR'S ABSTRACT.
III. REGISTRAR'S ABSTRACT.
IV. VENDOR AND PURCHASER ACT.
V. CROWN GRANT AND EARLY REGISTRATIONS.
VI. PARTICULAR TITLES:
1. Possession.
2. Wills.
3. Inheritance.
4. Decree.
5. Power of sale.
6. Vesting order.
7. Lis Pendens.
8. Mechanic's liens.
9. Insolvency.
10. Tax titles.
VII. OTHER ENCUMBRANCES:
1. Liens.
2. Bonds.
3. Writs.
4. Arrears of taxes.

II. PERSONAL PROPERTY.

I. PRELIMINARY.
II. SEARCHES:
1. County Court Office.
2. Sheriff's and Bailiff's Office.
3. Rent in arrears.
4. Liens.

CHAPTER III. 48-67

AGREEMENTS.

I. PRELIMINARY.
II. VOID CONTRACTS:
1. Immoral consideration.
2. Contrary to Statute Law.
3, Contrary to Public Policy.
III. VOIDABLE CONTRACTS:
1. Infants, &c.
2. Mistake.
3. Failure of consideration,
IV. CONSIDERATION.
V. AUTHENTICATION OF CONTRACTS:
1. Contracts requiring a seal.
2. Written contracts not requirins a seal.
3, Statutory Requisites.
VI. PLAN OF AGREEDENT.
VII. SUMMARY.
VIII. CONDITIONS OF SALE.
IX. SUBSEQUENT MATTERS:
1. Discharge.
2. Transfer.
3. Merger.

CHAPTER IV..... 68-104

SALES OF LAND.

I. PRELIMINARY.
II. RECITALS.
III. CONSIDERATION AND RECEIPT CLAUSE,
IV. GRANT AND FEOFFMENT.
V. NATURE OF GRANT:
1. Life estate.
2. Fee tail.
3. Fee simple.
VI. DESCRIPTION.
VII. EASEMENTS.
VIII. HABENDUM.
IX. COVENANTS:
1. Title.
2. Quiet enjoyment.
3. Free from encumbrances.
4. Further assurance.
5. Production.
6. General release.
X. DOWER:
1. Marriage settlement.
2. Election.
3. Adultery.
4, Alimony.
5, Dower in wild lands.
XI. SUBSEQUENT, MATTERS.
1. Vendors liens.
2. Interest, costs, &c.

CHAPTER V..... 105-132

LEASES.

I. PRELIMINARY.
II. LESSOR'S TITLE.
III. LEASES—HOW MADE:
1. Agreements for leases.
2. Void leases as agreements.
IV. PAROL LEASES.
1. Lessor's obligations and rights.
2. Lessee's obligations and rights.
V. LEASES BY DEED:
1. Short forms.
2. Habendum.
3. Reddendum.
4. Covenants:
(*a*) Pay rent and taxes.
(*b*) Repair.
(*c*) Keep up fences—Not cut down timber.
(*d*) Not assign, nor sublet.
(*e*) Quiet enjoyment.
5. Proviso for re-entry.
VI. DETERMINATION OF TENANCY:
1. Forfeiture.
2. Effluxion of time.
3. Notice.
4. Surrender.
VII. DISTRESS.

CHAPTER VI..... 133-155

I. MORTGAGES OF LAND.

I. Preliminary.
II. Advances—Security.
II. The Statutory Form of Mortgages.
IV. Recitals.
V. Estate Clause.
VI. Proviso for Redemption.
VII. Personal Covenant.
VIII. Other Covenants.
IX. Power of Sale or Leasing.
X. The Statutory Power of Sale.
XI. Dower.
XII. Rights of the Parties.

II. DISCHARGES OF MORTGAGES.

CHAPTER VII..... 156-175

ASSIGNMENTS.

I. Preliminary.
II. Assignment of Leases.
III. Assignment of Mortgages.
IV. Choses in Action.
V. Particular Assignments:
1. Stock, Shares, etc.
2. Copyright.
3. Patent right.
4. Trade marks—Designs.
5. Insurance policies.

CHAPTER VIII..... 176-215

PERSONAL PROPERTY.

I. Preliminary.
II. Divisions of Personal Property.
III. Gifts of Personal Property.
IV. Sales of Personal Property at Common Law.
V. Sales of Personal Property Under the Statute of Frauds:
1. The note or memorandum.
2. Goods, etc., within the Statute.
3. Good consideration.
4. Goods and chattels within this Act.
VI. Sales and Mortgages under R. S. O., cap. 119;
1. Scope and object of this Statute.
2. *Bona fides.*
VII. Conveyances Under the Revised Statute:
1. Points of similarity in conveyances of sales and mortgages.
2. Points of disagreement.
3. Form of conveyances under the statute.
4. Rights of the parties thereunder.
VIII. Sales and Mortgages of Vessels.
IX. Leases of Chattels.

CHAPTER IX.... ....216-251.

WILLS.

I. PRELIMINARY.
II. SOUNDNESS OF MIND.
III. UNDUE INFLUENCE.
IV. OTHER DISABILITIES.
V. THE WILLS' ACT OF ONTARIO.
VI. INSTRUCTIONS FOR DRAWING A WILL.
VII. FORM, ETC., OF THE INSTRUMENT.
VIII. EXECUTION:
1. Signature.
2. Witnesses, etc.
IX. REVOCATION.
X. REGISTRATION.
XI. PROBATE.

PRECEDENTS FORMS AND REFERENCES UNDER THE FOREGOINC CHAPTERS.

Introductory chapter 253
Title 267
Agreements 270
Sales of land 274
Leases 283
Mortgages 288
Assignments 294
Personal Property 303
Wills 311
Comparison of the statutes relating to conveyances and mortgages of land. 314
Statute respecting short forms of leases 332
Statute relating to sales and mortgages of chattel property as amended. 335

TABLE OF CASES CITED.

A

Adams, *re*, 236.
Adams v. Loomis, 9, 281.
Allan v. Fisher, 42.
Allen v. Flicker, 131.
Allen v. Jackson, 234.
Amiss, *re*, 246.
Anderson v. Anderson, 242.
Anderson v. Radcliffe, 167.
Anderson v. Trott, 102.
Annis v. Corbett, 161.
Archer, *re*, 244.
Ashford v. Hack, 159.
Ashmore, *re*, 246.
Attorney-General v. Day, 57.
Attorney-General v. Fullerton, 117.
Attorney-General v. Hall, 233.
Attorney-General v. The Merrimac Manufacturing Company, 182.
Attwater v. Attwater, 233.
Austin v. Boulton, 166.
Auworth v. Johnson, 116.
Ayling, *re*, 244.
Azema v. Casella, 52.

B

Babcock, *re*, 232.
Bacon, *re*, 236.
Bacon v. Campbell, 127.
Bailey, *re*, 244.
Baker v. Dewey, 76.
Baldwin v. Duignan, 43.
Ball v. Dunsterville, 23, 24.
Bandy v. Cartwright, 109, 114.
Bank of British North America v. Simpson, 61.
Banks v. Goodfellow, 221.
Barber v. Davis, 234.
Barclay v. Raine, 97.
Barnes v. Bellamy, 127.
Bartlett v. Jull, 150.
Bartlett v. Purnell, 62.
Bartlett v. Wells, 9.
Barton v. Barton, 234.
Baskerville v. Otterson, 164.
Bateman v. Hotchkin, 82.
Bayley v. Fitzmaurice, 60.
Bayley v. Williams, 13.
Baylis v. Dynely, 113.
Beale v. Sanders, 112.
Beardman v. Wilson, 157.
Beaven v. McDonell, 12.
Bellairs v. Bellairs, 234.
Bellamy v. Barnes, 127.
Bell v. Lee, 223.
Bennetto v. Holden, 9.
Berry v. Garrard, 93, 143.
Berry v. Heard, 215.
Berry v. Young, 104.
Bertram v. Pendry, 207.
Berwick v. Whitfield, 82.
Bigelow v. Bigelow, 236.
Bigelow v. Stacey, 154.
Bird v. Fox, 32.
Biscoe v. Van Bearle, 84.
Blackburn v. Smith, 32.
Bland v. Eaton, 60.
Bogart v. Paterson, 100
Bonter v. Northcote. 98.
Boustead v. Whitmore, 9.
Bower v. Brass, 95,
Bower v. Cooper, 63.
Bowles v. Stewart, 84.
Boys v. Rossborough, 222.
Bradford v. Belfield, 147,
Bradford v. O'Brien, 53.
Bradley v, Peixoto, 234
Brady v. Keenan, 103.
Brandon v. Robinson, 234.
Branniff, *re*, 245.
Brembridge v. Massey, 135.
Bremer v. Freeman, 241.
Bromley v. Brunton, 182.
Brooke v, Campbell, 43.
Broughton v. Jewel, 103.
Brown v. McNab, 6,
Brown v. O'Dwyer, 18, 19, 91,
Brumfit v. Martin, 66, 162.
Bryan v. Whyte, 239. 240.
Buchanan v. Campbell, 75.
Bull v. Harper, 70, 103.

Bunney v. Hopkinson, 94.
Bunten v. Georgen, 168.
Burn v. Carvallo, 170.
Burnham v. Garvey, 90.
Burnham v. Waddell, 131.
Byrd, *re*, 246.

C

Caldecott v. Brown, 83.
Cameron v. Spiking, 59.
Campbell, *re*, 101.
Campbell v. Lewis, 94.
Campbell v. Robinson, 96.
Campbell v. Shields, 124
Canada Permament Building and Loan Society v. Young, 70.
Cannon v. Hartley, 131.
Carder v. Morgan, 148.
Carlisle v. Tait, 201.
Carrick v. Johnston, 87.
Cartwright v. Cartwright, 219.
Cawthra v. McGuire, 152.
Champney v. Blanchard, 181,
Charles, *ex parte*, 167.
Charles, *re*, 32.
Chetham v. Williamson, 121.
Chisholm v. Potter, 212.
Chowne v. Baylis, 170.
Church v. Brown, 94, 110, 118, 157,
Clariss v. Ellis, 41.
Clark, *re*, 244.
Clark v. Bonnycastle, 6, 87.
Clark v. Buchanan, 42.
Clark v. Hamilton and Gore Mechanics' Institute, 7.
Clarkson v. Kitson, 51.
Clavering v. Clavering, 82.
Clement v. Donaldson, 24,
Close v. Belmont, 161.
Clow v. Brogden, 162.
Cobb v. Stokes, 115, 117, 129.
Coe v. Clay, 114, 115.
Coit v. Stockweather, 27.
Colegrave v. Dias Santos, 89.
Collard v. Bennett, 75.
Colman, *re*, 246.
Connell v. Power, 127, 128.
Cook v. Jones, 43.
Cook v. Turner, 232.
Coomber v. Howard 119.
Cooper v. Emery, 104.
Cooper v. Willomatt, 209.
Corbett v. Taylor, 95.
Corbyn v. French, 281.
Corporation of Whitby v. Liscombe 6.
Cotter v. Sutherland, 42.
Coulthard, *re*, 237.
Court v. Holland, 164.
Cowling v. Dickson, 130
Cozens v. Crout, 242.
Cracknall v. Jansen, 191.
Craig v. Craig, 89.
Craig v. Templeton, 99.
Crane v. The London Dock Co., 185.
Cresswell v. Cresswell, 242.
Crocker v. Sowden, 8.
Croft v. Croft, 245.
Croft v. Lumby, 126.
Crusoe d. Blencowe v. Rugby, 157.
Crysler v. Creighton, 90.
Cullen v. Nickerson, 23.
Cumming v. Hill, 111.
Cummins v. Scott, 60.

D

Dack v. Currie, 95.
Dadds, *re*, 247.
Dagg v. Dagg, 251.
Dance v. Goldingham, 66.
Daney v. Durant, 148.
Daniel v. Gracey, 121.
Dann v. Spurrier, 119.
Davenport v. Davenport, 99.
Davidson v. Boomer, 100, 236.
Davidson v. McKay, 29.
Davis, *re*, 248.
Davis v. Evans, 203.
Davis *et al.* v. McPherson, 87.
Davis v. Sheppard, 83.
Davis v. Van Norman, 38.
Davison v. Stanley, 130.
Deare v. Elwyn, 221.
Dearle v. Hall, 170.
Dehart v. Dehart, 4.
Derby v. Taylor, 161.
De Roo v. Foster, 9.
Devaynes v. Robinson, 149.
Dickerman v. Abrahams, 176.
Dilke v. Douglas, 154.
Dobbie v. Tully, 42.
Dodd v. Acklem, 131.
Dodds v. Durand, 184.
Doe d. Auldjo v. Hallister, 44.
Doe d. Baker v. Clark, 177.
Doe d. Biggard v. Millard, 21.
Doe d. Burnham v. Simmons, 44.
Doe v. Carter, 126.
Doe v. Cox, 129.
Doe v. Crick, 129.
Doe d. Ellis v. McGill, 24.
Doe v. Forster, 130.
Doe d. Griffith v. Lloyd, 214.
Doe d. Jackson v. Wilkes, 6.
Doe d. Kemp v. Gardner, 112.
Doe v. Marchetti, 129.
Doe d. Meyers v. Marsh, 90.
Doe d. Murray v. Smith, 88.

Doe d. Pitt v. Hogg, 158.
Doe d. Sheldon v. Ramsay, 6.
Doe d. Shore v. Parker, 129.
Doe d. Shore v. Porter, 113.
Doe v. Smith, 130.
Doe d. Thompson v. Ainey, 113.
Doe d. Wood v. Fox, 90, 166.
Dominion Loan Society v. Darling, 153.
Doon v. Davis, 251.
Douglas v. Murphy, 161.
Dove v. Dove, 115, 123.
Drake v. Wigle, 83.
Draper, *re*, 239, 240.
Driffil v. McFall, 102.
Dudley v. Warde, 83.
Duffy v. Smith, 27.
Duncombe v. Mayer, 84.
Dunk v. Hunter, 132.
Dunn v. Turner, 87.
Durance, *re*, 246.
Dyer v. Bowley, 122.

E

Eagles, *re*, 101.
Earl Beauchamp v. Winn, 52.
Earls v. McAlpine, 232.
East v. Troyford, 237.
Eccles v. Lowry, 12.
Eckersley v. Platt, 247.
Edge v. Strafford, 58, 117.
Edwards v. Edwards, 240.
Egleson v. Howe, 164.
Elliott v. McConnell, 164.
Elsworthy v. Hewett, 126.
Emes v. Emes, 220.
Emmett v. Quinn, 123.
Evanturel v. Evanturel, 232.
Charles, *ex parte*, 167.
Johnson, *ex parte*, 154.

F

Fallon v. Keenan, 143.
Farlinger v. McDonald, 203, 204.
Farquhar v. The City of Toronto, 170.
Farrar v. Nightingale, 184.
Farrar v. Winterton, 246.
Featherstone v. McDonell, 9.
Fenn v. Bittlestone, 215.
Ferguson v. Freeman, 43.
Flanders v. Barstow, 203.
Flight v. Booth, 162.
Flint v. Smith, 102.
Follis v. Porter, 70.
Forrest v. Laycock, 151.
Forster v. Haggart, 148.
Forsyth v. Boyle, 87.
Foster v. Geddes, 24.
Francis v. St. Germain, 12.
Franklin, *re*, 43.
Fraser v. Bank of Toronto, 207
Fraser v. Fralick, 28.
Fraser v. Fraser, 22, 25.
Frith v. Osborne, 149.
Fry v. Fry, 149.

G

Gallagher v. Gallagher, 9.
Gallinger v. Farlinger, 233.
Gamble v. McKay, 93.
Gamble v. Rees, 92, 127.
Gardiner v. Parker, 132.
Garth v. Cotton, 83.
Gilchrist v. Ramsay, 9.
Gilkison v. Elliott, 100.
Gillen v. Havnes, 88.
Gilliat v. Gilliat, 235.
Gooderham v. De Grassi, 163.
Gooderham v. Marlatt, 184.
Gordon v. Harper, 215.
Gordon, *re*, v. McPhail, 41.
Goss v. Nugent, 67.
Gott v. Gandy, 115.
Graham v. Law, 101.
Granger v. Latham, 32.
Grantham v. Elliott, 122, 123.
Grant v. Lynch, 111.
Gray v. Hatch, 84.
Great Western Railway Company v. Jones, 103.
Greenwood v. Greenwood, 221.
Greet v. The Citizens' Insurance Company, 141.
Griffiths v. Griffiths, 241.
Grover v. Grover, 181.
Gwynne v. Manistone, 119.

H

Haisley, *re*, 127, 167, 158, 160.
Haldane v. Johnson, 122.
Hall v. Conder, 174.
Hall v. Hill, 42.
Hall v. Morley, 143.
Hallett v. Middleton, 97.
Halliday v. Denison, 89,
Ham v. Ham, 99.
Hambley v. Fuller, 281.
Hamilton v. Dennis, 24.
Hamilton v. Harrison, 190, 193, 196.
Handley v. Stacey, 222.
Harman v. Reeve, 186.
Harnett v. Maitland, 117, 118.
Harrison v. Blackburn, 195.

Harrison v. Frost, 87.
Harris v. Commercial Bank, 207.
Harris v. Meyers, 167.
Hart v. Brown, 89.
Harvey v. Phillips, 104.
Haskill v. Fraser, 100.
Hastilow v. Stobie, 244.
Hawkins v. Gardiner, 76.
Hawtrey v. Butlin, 142.
Haynes v. Gillen, 88.
Hayne v. Maltby, 74.
Haynes v. Smith, 95.
Hayward v. Thacker, 22, 25.
Hebner v. Williamson, 83.
Heward v. Jackson, 90.
Heward v. Scott, 100.
Hicks v. Snider, 238.
Hiern v. Mills, 45.
Hills v. Lanning, 73.
Hodgkinson v. Crowe, 129.
Hodson v. Treat, 209.
Holford v. Hatch, 161.
Holland v. Moore, 29.
Holliday v. Holgate, 184.
Holroyd v. Marshall, 197.
Holt v. Carmichael, 207.
Holtgate v. Kay, 117.
Holtzappfel v. Baker, 116, 121.
Honeywood v. Honeywood, 82.
Hood v. Barrington, 61.
Horsey v. Graham, 57.
Houghton v. Koenig, 21.
Howard, *re*, 246.
Howell v. McFarlane, 207.
Hoyt v. Widdifield, 95.
Hubert v. Treherne, 61.
Hudson v. Kersey, 245.
Hughes v. Parker, 85.
Hughes v. Rowbotham, 131.
Hughes v. Towers, 117, 132.
Huguenin v. Basely, 13, 222.
Hull v. The City of London Brewery Company, 109.
Humble v. Hunter, 74.
Hume v. Bentley, 107.
Hurburt v. Thomas, 69.
Hussey v. Hussey, 82.
Hutcheson v. Roberts, 207.
Hutton v. Fish, 21, 23.
Hyatt v. Griffith, 113.

I

Iler v. Nolan, 88.
Ing v. Cromwell, 202.
Ingoldsby v. Ingoldsby, 220.
Inson *et al.* v. Reynolds, 87.
Irving, *in re*, 170.
Ivens v. Elwes, 93.
Izod v. Lamb, 215.

J

Jackson v. Bowman, 75.
Jackson v. Campbell, 25.
Jackson v. Yeomans, 93, 143.
James v. Whitebread, 21.
Jamieson v. Fisher, 100.
Jamieson v. McCollum, 88, 89.
Jeakes v. White, 58.
Jemott v. Cowley, 128.
Jenkins v. Jones, 148.
Jenner v. Jenner, 73.
Johnson, *ex parte*, 154.
Johnson v. Crofoot, 189.
Jones, *re*, 234.
Jones v. Jones, 234.
Jones v. Lock, 182.
Judge v. Thompson, 22.
Jury v. Pigott, 90.

K

Keech v. Hall, 208.
Keefer v. Merrill, 132.
Keigwin v. Keigwin, 244.
KeKewick v. Manning, 182.
Kelley v. Webster, 58.
Kelly v. Patterson, 129.
Kendrew v. Shewan, 70, 98.
Kennedy v. Solomon, 95.
Kerr v. Coghill, 89, 90.
Kerr v. Hastings Mutual Insurance Company, 175.
Kerr v. Reade, 170.
Ketchum v. Mighton, 37
Keyes v. O'Brien, 127.
Keyse v. Haydon, 32.
Kindleside v. Harrison, 224.
Kirkwood v. Thompson, 148.
Kitchen v. Murray, 32.
Knight v. Barber, 59.
Knight v. Crockford, 61.

L

Lady Chester's Case, 235.
Laing v. The Ontario Loan and Savings Company, 19, 47, 141, 142, 196.
Lai v. Stall, 70.
Lambe v. Orton, 170.
Lamert v. Heath, 52.
Lampon v. Corke, 76.
Lancey v. Johnson, 124, 117.
Langford v. Mahony, 104.
Langstaff v. Meague, 142.
Lansdowne v. Lansdowne, 51.
Larges' Case, 233.
Lario v. Walker, 91.

Latch v. Bright, 29.
Latch v. Furlong, 148, 149.
Lavin v. Lavin, 75.
Lawes v. Purser, 174.
Lawlor v. Lawlor, 85, 155.
Lawlor v. Murchison, 74.
Lawlor v. Sutherland, 161.
Lawrence v. Errington, 70.
Lawton v. Lawton, 83.
Lawton v. Salmon, 83.
Lay v. Mottram, 93.
Lee v. Alston, 82.
Lee v. Gaskell, 58.
Lee v. Lancashire Railway Co., 76.
Lee v. Lorch, 127.
Leeds v. Cheetham, 121.
Legg v. Benion, 129.
Lehman v. McArthur, 125.
Leland v. The Medora, 213.
Leonard v. Merritt, 28.
Lewis Bowles' Case, 83.
Leys v. Fisken, 126.
Liddell v. Munro, 93.
Lincolns' College Case, 174.
Lindsay Petroleum Company v. Pardee, 5.
Linet, *re*, 38.
Little v. Aikman, 23.
Livermore v. Bagley, 177.
Llewellyn v. Jersey, 88.
Lloyd v. Henderson, 37.
Loeschman v. Machin, 209.
Logie v. Young, 42.
Loughead v. Stubbs, 99.
Lovelace v. Harrington, 96, 147.
Lundy v. Dovey, 112.
Lyle v. Richards, 88.
Lynch v. O'Hara, 100.

M

Macaulay v. Allen, 208.
Macdonald v. Macdonald, 51.
Mackay, *re*, 233
Mackreth v. Symons, 102.
Macleay, *re*, 233.
Magee v. Rankin, 126.
Mahoney v. Burdett, 240.
Makaness v. Long, 183.
Makin v. Wilkinson, 115.
Mansfield, *re*, 244.
Marquess of Winchester Case, 219.
Marshall v. Green, 59.
Martin v. Bearman, 165. 167.
Martin v. Crow, 86, 87.
Martin v. Hanning, 28.
Martin v. Martin. 220, 221.
Martin v. Smith, 111.
Martin v. Woods, 143.
Martindale v. Clarkson, 152.
Mason v, McDonald, 207.
Mason v. Seney. 51, 75.
Maughan v. Hubbard, 27.
May v. The Security Loan and Savings Society, 196.
McAdam v. Walter, 219.
McDonald v. McDonald, 28, 102, 149.
McDonald v. McDonell, 8,
McDougall v. Young, 161.
McEachern v. Somerville, 87.
McGregor v. McMichael, 87.
McIntosh v. James, 126.
McIntosh v. Wood, 99. 152.
McKay v. McKay,19, 140.
McKay v. Reed, 93.
McLean v. Tinsley, 53.
McLellan v. Meggat, 100.
McLennan v. McLean, 155.
McLeod v. Truax, 248.
McMartin v. McDougall, 202.
McPherson v. Dougan, 163.
McQueen v. Farquhar, 149.
McSherry, *re*, 10, 12
Menzies v. White, 221.
Mercer v. Hewston, 281.
Mercer v. The Attornney-General of Ontario, 5, 254.
Mews v. Carr, 61.
Michie *re*, v. The Corporation of Toronto, 123.
Miles v. Furber, 132.
Mills v. Banks, 149.
Mills v. King, 207
Minshell v. Oakes, 158.
Mitchell v. Coffee, 132.
Mitchell v. McDuffy, 132.
Mitchell v. McGaffey, 102.
Montgomery v. Spence, 159.
Montgomery v. Wright, 207.
Moore v. Boulton, 95
Moore v. Royd, 23.
Moore v. Hynes, 95.
Moore v. Kay, 114, 115, 117.
Moore v. Sibbald, 184.
Moore v. Skinner, 151.
Moran v. Currie, 166.
Moray v. Totten, 51.
Morgan v. Quesnel, 42.
Morris v. Harris, 83.
Morton, *re*, 235, 250.
Moule v. Garrett, 107.
Muir v. Waddell, 170.
Munro v. Smart, 217, 225, 231.
Murray v. Van Brocklin, 28.
Muzzy v. Knight, 202.
Myerstein v. Barber, 188.
Mykel v. Doyle, 90.

N

Nagle v. Kilts, 24.
Napper v. Allington, 97.
Nash v. Palmer, 95.
Neale v. Winter, 74.
Neff v. Thompson, 101.
Newman v. Anderton, 214.
Newns, *re*, 237.
Newton v. Clarke, 245, 246.
Nicholson v. Burkholder, 236.
Noke's Case, 115.
Nolan v. Fox, 88.
North of Scotland Company v. German, 146.
Nunn v. Fabian, 111.

O

O'Connor v. Beatty, 25.
O'Donnell v. Hugill, 69.
O'Donnell v. Tiernan, 87.
Oldershaw v. Holt, 120.
Olding, *re*, 246.
Oliver v. Newhouse, 215.
O'Neill v. Small, 203.
O'Sullivan v. Cluxton, 63, 67, 69.
Otway v. Sadlier, 246.
Owens v. Thomas, 21.
Owston v. Williams, 90.

P

Paice v. The Archbishop of Canterbury, 231.
Parke B., *per*, 195.
Parker v. Taswell, 111.
Parkhurst v. Roy, 46, 217.
Parkinson v. Hanbury, 148.
Parks v. Hall, 203.
Parr v. Lovegrove, 103.
Parr v. Montgomery, 153.
Parsons, *re*, 179.
Partington's Case, 233.
Paton v. Dickson, 251.
Patterson v. Thompson, 132.
Peck v. Carey, 224.
Pennyman v. McGrogan, 233.
Perrott v. Perrott, 82.
Perry v. Roberts, 234.
Pew v. Lafferty, 234.
Peyton's Settlement, *re*, 149.
Phillimore v. Barry, 61.
Phillips v. Gutteridge, 166.
Phipps v. Sculthorpe, 130.
Pidgeley v. Rawling, 82.
Piper v. Simpson, 22, 122.
Plumb v. McGannon, 89
Poulett v. Hood, 7.
Powley v. Walker, 117.
Pronguey v. Gurney, 132.
Propert v. Parker, 110.
Proudfoot v. Austin, 42.

Q

Queen v. Carter, 181.

R

Rae v. Geddes, 103.
Reed v. Ranks, 32.
R. v. Ferrybridge, 82.
Regina v. Brewster, 90.
Regina v. O'Meara, 27.
Reid v. Whitehead, 155.
Rhodes v. Buckland, 148.
Richardson v, Armitage, 75.
Richardson v. Gifford, 112.
Richardson v. Langridge, 112.
Richardson v. Ranney, 132.
Richardson v. Richardson, 182.
Richmond v. Evans, 148.
Riddell v, Riddell, 94.
Right v. Darby, 129.
Right d. Lewis v. Beard, 129.
Ringer v. Cann, 195.
Robertson, *re*, v. Robertson, 41.
Robins v. Clark, 191, 198.
Robson v. Flight, 148.
Roe v, Sales, 126.
Rogers v. Lowthian, 275.
Rooke v. Kensington, 73.
Ross v. Iles, 234.
Rowe v. Street, 127.
Rupert v. Johnston, 181.

S

Saloway v. Strawbridge, 147.
Sanderson v. Jackson, 61.
Schofield v. Dickinson, 42.
Schultz v. Reddick, 131.
Scott v. Eastern Counties Railway Company, 186.
Scott v. Porcher, 170.
Scriver v. Myers, 127.
Seaton v. Lunney, 78, 79, 91.
Sefton v. Hopwood, 222.
Shank v. Cates, 84.
Sharman, *re*, 242.
Sharr v. Pilch, 46.
Shaw v. Bird, 233.
Shaver, *re*, 9.
Sheedy v. Roach, 182.
Shelley's Case, 91.
Sherman v. Parsill, 102.
Shirley v. Newman, 129.
Shower v. Pilch, 181.
Skinner v, Ainsworth, 70, 99.
Slater v. Fisken, 41.
South Australian Insurance Company, v. Randell, 184.

Smart v. Harding, 58.
Smith v. Boustead, 236.
Smith v. Brown, 212.
Smith v. Clemas *et al*, 87.
Smith v. Faught, 232.
Smith v. Harris, 244.
Smith v. Knight, 236.
Smith v. Marrable, 115.
Smith v. Smith, 245.
Spencer's Case, 121, 158,
Spirit of The Ocean, 212.
Stammers v. O'Donohoe, 96.
Stammers v. Preston, 59.
Stanton v. Windeat, 89,
Stephenson, *re*, 234.
Stevens v. Buck, 86.
Stevenson v. Bain, 64.
Stewart v. Hunter, 70.
Stinson v. Magill, 159.
Stoddart v. Stoddart, 154.
Stracey, *re*, 237.
Stranks v. St. John, 107, 109, 114, 115.
Stronghill v. Buck, 74.
Styles v. Wardle, 119.
Summers v. Cook, 187.
Superior Savings and Loan Company, v. Lucas, 141, 153.
Surplice v. Farnsworth, 121.
Swire v. Leach, 132.
Switzer v. McMillan, 10.

T

Taylor v. Beale, 122.
Taylor v. Meade, 243.
Thibeaudeau v. Skead, 87.
Thirkell, *re* Perrin v. Wood, 208.
Thomas, *re*, 239, 240.
Thomas v. Cook, 131.
Thompson v. Browne, 237.
Thompson v. Thompson, 98.
Thompson v. Torrance, 221, 223.
Tiffany v. Clarke, 166.
Timmins v. Rowlinson, 115, 129.
Todd v. Cain, 24.
Tohey, *re*, 246.
Tomlinson v. Hill, 99.
Toppin v. Lomas, 57.
Toronto Street Railway Company v. Fleming, 179.
Totten v. Douglas, 163.
Townsend v, Wilson, 147.
Trust and Loan Company v. Gallagher, 154.
Trust and Loan Company v. Lawrason, 19, 47, 142, 153.
Turley v. Benedict, 118.

V

Van Norman v. Beaupre, 98.
Vaughan v. Hancock, 58.
Viet v. Viet, 181.
Viney v. Chaplin, 76.
Vinnicombe v. Butler, 245.

W

Waddell v. McColl, 144.
Wafer v. Taylor, 152.
Waldron v. Jacob, 61.
Walker v. Hatton, 162.
Walker v Jones, 165.
Walker v. Powers, 99.
Wallbridge v. Everett, 95.
Walton v. Hill, 100, 101.
Wapels v. Ball, 42.
Ward v Beck, 214.
Wardell v. Trenouth, 70.
Ware v. Cann, 233.
Waring v. Hogarth, 162.
Warlow v. Harrison, 61.
Waterhouse v. Lee, 222.
Watson v. Lindsay, 34.
Watson v. Wellington, 170.
Watt v Feader, 166.
Watts v. Symes, 166.
Weiss v. Crafts, 104.
Wellington v. Chard, 170.
West v. Ray, 243.
Wheelden v. Milligan, 131.
Whicker v. Hume, 38, 241.
White v. Brown, 208.
White v. Laing, 99, 100, 101.
Whittier v. McLennan, 23, 24, 25.
Wigle v. Stewart, 88.
Wiles v. Woodward, 74.
Wilkinson v. Wilkinson, 170 234.
Williams v. Grey, 131.
Williams v. Morris, 183.
Wilson v. Biggar, 95, 97.
Wilson v. Kerr, 208.
Wilson v. Nightingale, 131.
Wilson v. Wilson, 220.
Wilton v. Dunn, 108.
Winter v. Lord Anson, 73, 76.
Wishart v. Cook, 38.
Wittrock v. Halliman, 160.
Wood v. McAlpine, 170.
Wood v. Tate, 113.
Woolam v. Hearn, 60.
Worsley v. Finch, 101.
Wotton, *re*, 244.
Wright v. Stavert, 58.
Wright v. The London Life Assurance Company, 24.
Wright v. The Sun Mutual Life Insurance Company, 24.

Y

Young v. Roberts, 165.
Young v. Young, 10.

PLAN OF WORK.

1. Introductory Chapter.
2. Title—Realty and Personalty.
3. Agreements—Conditions of Sale.
4. Sales of Land.
5. Leases.
6. Mortgages.
7. Assignments.
8. Personal Property.
9. Wills.
10. Precedents, Forms and References under the above chapters in order.
11. Comparisons of the Statutes relating to Forms of Conveyances and Mortgages.
12. Statute relating to Short Form of Leases.
13. Statute relating to Chattel Mortgages, etc., as amended to 1882.
14. Index to Treatise.
15. Index to Precedents, etc.

PRACTICAL CONVEYANCING.

INTRODUCTORY.

I. PRELIMINARY.

II. PARTIES:
- 1. *The Crown.*
- 2. *Corporations.*
- 3. *Trustees.*
- 4. *Husband and wife.*
- 5. *Infants.*
- 6. *Lunatics.*
- 7. *Other disabilities.*

III. SUBJECT MATTER OF THE CONTRACT AND LAW GOVERNING IT.

IV. SHORT FORMS OF CONVEYANCING.

V. RECITALS.

VI. DATE.

VII. DUPLICATES.

VIII. EXECUTION:
- 1. *Signature.*
- 2. *Sealing.*
- 3. *Delivery.*

IX. WITNESSING AND PROOF OF EXECUTION.

X. ALTERATION, CANCELLATION, ETC.

XI. REGISTRATION.

I. PRELIMINARY.

The object of this treatise is to afford to the student or young practitioner such instruction and information as will enable him to prepare with accuracy the several kinds of instruments that are ordinarily included in the term conveyancing.[1] These will include agreements, sales, mortgages, leases and assignments, and will be preceded by an enquiry into the title to property—both real and personal, and concluding with a chapter on Wills—the only one sub-

[1] Conveyance includes a feoffment, grant, lease, surrender, or other assurance of land; R. S. O. cap. 98, sec. 1. A will is not an assurance under the Act respecting Descent. The word conveyance is not properly applicable to personal property. The correct term is alienation. See chapter on Bills of Sale, *post.*

ject upon which, so far as the conveyancer is concerned, the law regarding realty and personalty may be said to be identical. On each of the subjects hereafter referred to, there will necessarily be found many points common to all, and with the exception of Wills there is indeed a sort of family likeness in almost every assurance of land. The foundation of conveyances lies in contract, and a contract implies contracting parties—capacity to enter into the contract—some subject matter of the contract and the *consensus* of the parties to the same thing. These, and some other matters to be noticed presently, must not be lost sight of no matter what the conveyance may be, and it is necessary to be thoroughly informed on these points in order to take instructions intelligently, or advise on any sort of instrument disposing of lands or chattels.

Conveyances, with perhaps only one exception in real property, require to be in writing, and the writing must be under seal—that is a Deed. A Deed has uniform solemnities—it has or ought to have a date, should be signed and sealed, and should be delivered. Almost any instrument affecting real estate may be registered, and any instrument may be cancelled after execution.

It will thus be seen that there are a number of points common to several instruments in conveyancing and a few common to them all. It is proposed in the present chapter to comment upon these, and the student will bear this carefully in mind, and before wishing to study any subsequent chapter (except Wills) he must become familiar with such elementary things as are here set out, and which are generally of essential importance to the effectual operation of the instruments he may be considering. It will be of little benefit if great ingenuity be displayed in elaborating a special conveyance, when it may be discovered that the parties were incapable, or the execution defective, or the registration omitted, or that any of the many points to be attended to have been overlooked. So many of these details are entrusted to students that it is especially necessary they should be familiar with them.

II. PARTIES.

Several important questions arise as to parties:

1st, What persons are proper and necessary parties? and

2nd, Are these possessed of sufficient contracting capacity to convey or hold the property under consideration?

So far as the proper parties are concerned, it is perhaps a truism to say that every person, who has an interest in lands or chattels, must join in a conveyance disposing of them before they indisputably become the property of another.

The investigation of the title discloses who are the owners—who have an interest in the property—whether it still remains in the Crown, whether held by a corporation, by joint owners, held in trust, held by a married woman, or held by an infant, idiot or lunatic, a traitor or a felon, etc.

If the property is held in trust, then the legal and equitable owners must ordinarily be parties, and the latter must be of the full age of twenty-one years, and not otherwise incapacitated. But the fact that property is sold by an agent, or under power of attorney, is no reason why these, the agent or attorney, should be made parties.[1] The principals in both cases are the proper and necessary parties. Corporations are known by the corporate name, but partners in business must convey individually; their firm name is not known to the law of real property. Infants, idiots and lunatics, where they are permitted to deal in the disposition of their property, are necessary parties; but where the High Court of Justice gives a vesting order to a purchaser, the parties are dispensed with in it, though they must all be before the Court.[2]

Persons invested with a power of sale or mortgage, such as trustees, executors or mortgagees under a power of sale, are necessary, and generally, though not necessarily, sufficient parties. Where any estate of inheritance is being

[1] See under Execution in this chapter.

[2] See under Vesting Order, chap. II.

sold or mortgaged the husband or wife of the vendor may be necessary parties, in order to dispose of any interest in the property they may have therein.

The parties to whom a disposition of property is made are not so difficult to determine, but every person to whom any interest in property is to be granted should be made a party to the instrument.

A husband or wife of a purchaser is not made a party in order to secure them in their legal interest—that in our law may be said to accrue in virtue of marriage. The remarks that have been made in reference to corporations, partnerships, infants, and idiots, apply so far as these may be parties recipients.

It is of no importance where the parties live, as the objection on the ground of alienage cannot now prevail,[1] an alien having the same capacity, apparently, to hold and convey real estate in this Province, as a natural born or naturalized subject of Her Majesty.[2]

The capacity to contract is restricted in some persons and entirely absent in others. A wife's interest in her own lands cannot apparently be disposed of without certain formalities, and an infant—that is any person under twenty-one years of age—cannot dispose of it so effectually as not to be able to repudiate his act after majority. An idiot or lunatic is generally incapacitated from dealing with his property. A trustee cannot divest himself of the obligations of his trust estate without the consent of his *cestui que trustent*. A corporation must be guided by its charter, and take care not to go beyond its enabling provisions; and until recently an alien could neither buy nor sell real estate in this Province. These and some other disabilities will be referred to presently. It may not be out of place to make a few remarks on what is the source of ownership in property.

[1] *Dicksee v. Dicksee*, 26 C. P. 489.
[2] R. S. O. cap. 97.

1. Crown. The Crown is the absolute owner of such lands within the Province, as it has not disposed of already, and there is moreover a doctrine in law that on the failure of heirs of a grantee from the crown, the land reverts back to it by *escheat*. But where lands are granted to a corporation by a third party, and the corporation becomes dissolved, it seems that there is no escheat.[1] There is no higher owner than the crown—there is a superior owner to every grantee not a creature of the crown—the subject has the absolute *use* of land—the crown has the absolute ownership—the *Dominium*.[2]

The crown where it conveys directly, does so by open letters of grant *literæ patentes*, and so the name of the crown grants came to be called Patents. The usual words corresponding to the extent of the grant are the same as in other deeds, but the crown in selling land never enters into convenants for title.[3]

Crown grants are construed in favor of the grantee; for the honor of the crown the largest possible meaning is to be given to its grants.

The Lieutenant-Governor of this Province is assumed to represent the crown for the purpose of disposing of the public lands.[4]

[1] In *Lindsay Petroleum Co.* v. *Pardee*, 22 Chy. 18, it was held that a corporation constituted under C. S. C. cap. 63 and 29 Vic. cap. 21, allowing the period named on the declaration of the shareholders of the company to pass before disposing of lands purchased by them, ceased to have any interest in the lands, and that the lands had reverted to the grantors.

[2] In the celebrated case of *Mercer* v. *The Attorney-General of Ontario*, it was conceded by counsel in the argument in the Supreme Court of Canada, that on failure of heirs the crown took by escheat, the question reduced itself to this. Does the Provincial Attorney-General or the Dominion Attorney-General represent the crown?

[3] Deane on Conveyancing, page 341.

[4] In this Province, in the Department of Crown Lands, both before and since Confederation, the different Executive Governments in power have assumed that the Queen is the Executive of the Local Legislature and that the Lieutenant-Governor is representative of Her Majesty. Crown Patents are therefore issued from this department just as they would be in Ottawa, or in London, England, at the proper land offices of the Governments there. This assumption of Royal power has not passed unchallenged by the Courts, but if the full extent of the doctrine that the Queen has no place in the Local Legislatures be pushed to its legitimate conclusions, it would be found that grants so made are technically incorrect. The powers granted to municipal and other corporations are at all events exercised differently from those granted to the Provincial bodies.

The patents as they are called are under the great seal and must be a matter of record,[1] and the grantees must be capable of taking.[2] Whether the grant be for a valid consideration or of special favor, it is to be construed in the same manner as deeds from subject to subject.[3]

2. Corporations. As regards grants by and to corporate bodies, the statute creating them must be carefully looked into, and unless they have the express power to hold and acquire property they cannot be grantees; nor can they convey unless they have equally express power of disposing. All the formalities laid down by the Act must be scrupulously followed as to parties, execution, witnesses, etc. If a bare power to sell is given, an objection may be taken that this is not sufficient to warrant a mortgage, though a power to sell has been held to include that of leasing. Where there was no express word in a statute (though stated in the preamble) empowering a corporation to receive by devise, it was argued strongly that the power to take by grant did not include that of a gift by will under the statute.[4] The power of acquiring real estate and disposing of it are, however, the most ordinary powers conferred on a corporation. Municipal Corporations, Loan, and other companies, and the various lay and ecclesiastical corporations, have all more or less these powers. In regard to charitable bequests to corporations, it has been held that the statutes of Mortmain, 9 Geo. II. cap. 36, relating to charitable uses, are in force in this Province,[5] and that they apply to municipal corporations.[6]

A corporation aggregate capable of taking and conveying lands can convey by deed of bargain and sale, and they are within the terms of the Short Forms Act as parties. No covenants can ordinarily be exacted from a municipal cor-

[1] *Doe d. Jackson* v. *Wilkes*, 4 O. S. 142.
[2] *Doe d. Sheldon* v. *Ramsay*, 9 Q. B. 105.
[3] *Clark* v. *Bonnycastle*, 3 O. S. 508.
[4] Unreported case in the Common Pleas.
[5] *The Corporation of Whitby* v. *Liscombe*, 23 Chy. 1.
[6] *Brown* v. *McNab*, 20 Chy. 179.

poration unless the usual one from a trustee, and it would seem that any limited owner who sells under a statutory power need not enter into covenants beyond his own interest.[1]

The general rule is that, unless for trivial matters, all contracts and agreements made with corporations must, to bind them, be under their corporate seal. But where work done for a corporation is such as was evidently contemplated by their charter, and they have accepted and availed themselves of it, they cannot refuse to pay on the ground that there was no contract under seal.[2] (See cases under Execution).

3. Trustees. A trustee is a person who has the legal estate, though some other person may have the beneficial interest in the property in question. If land is granted unto and to the use of A. to hold to the use of B., A. is the legal owner, as trustee; B. is the equitable owner, as the *cestui que trust*. Also where B. mortgages his farm to A. in the usual form; A. is trustee for B. after the payment of the mortgage money.

Where property is held in trust by one man for another's benefit the former as trustee cannot, unless the trust instrument gives such power, convey the entire legal and equitable estate; he can, it is true, convey the legal estate, but this may not relieve him of his obligations under the trust unless the *cestui que trust* is a consenting party thereto. Deeds of this kind should set out the owners of the legal and equitable estates as the parties thereto, the consent of the *cestui que trustent*, where that is necessary, the fact that they are of age if the equitable estate was created during the minority of the latter.

The instrument by which the trust was created must be first of all examined and the powers given to the trustees closely followed.

The usual covenant where a trustee conveys, is that he himself has done no act to encumber the property, and it

[1] *Poulett* v. *Hood*, L. R. 5 Eq. 115.

[2] *Clark* v. *The Hamilton & Gore Mechanics' Institute*, 12 Q. B. 178.

would seem that any limited owner who sells under a statutory power need not enter into convenants for title extending beyond his own interest.[1] Mr. Dart also lays down the rule that owners of land, whose estates are altogether taken compulsorily, as for instance by a railway company need not enter into any covenants at all. The equitable owner of an estate or the person beneficially interested in the purchase money covenants for the acts of those in whom the legal estate is vested.[2]

Where executors convey land under a power of sale in the will of their testator, they should not covenant for themselves, their heirs, etc., in their deed to the purchaser that the testator had a good title as they will be personally liable on that covenant, as it has been held that the grant by them *qua* executors, could not control their express contract.[3]

4. Husband and Wife. A husband is under no disability to convey or mortgage his own interest in any estate of which he is owner. But as regards estates of inheritance he cannot convey or mortgage his wife's interest (if any) or give what his purchaser or mortgagee has the right to expect unless she is made a party and bars her dower therein, or unless she is disentitled. This will be referred to at length in the chapters on sales and mortgages.

The wife on the other hand cannot dispose of her own interest where she is the legal owner without her husband being made a party to the instrument. She is therefore yet under some disability, although a Judge of the High Court of Justice, or of the County Court, can come to her assistance where the consent of her husband cannot be obtained.[4]

[1] Dart, V. & P. 503.

[2] Greenwood Concise Conveyancer, 12.

[3] *McDonald* v. *McDonnell*, 6 O. S. 109.

NOTE.—It is recommended to separate the legal from the equitable owners in a conveyance.

[4] A wife can apparently execute a deed alone if her husband is in prison; *Crocker* v. *Sowden*, 33 Q. B. 397. See R. S. O. cap. 127.

But so far as her equitable estate is concerned, the husband is not a necessary party to a conveyance thereof.[1]

5. Infants. An infant, unless with the sanction of the High Court of Justice, cannot convey his interest in land so as to be binding on him after he attains the age of twenty-one years. Care should therefore be taken that the conveying party is over that age, and in cases suggestive of doubt a statutory declaration ought to be taken (see forms). A person choosing to run the risk of a minor not repudiating his contract after majority, must of course assume that responsibility—but he should be told that the effect of such a transfer is virtually to have the sale lie in abeyance, to see if the infant after his majority will refuse to be bound by it.[2] The infant is not bound, immediately after he becomes of age to act, but his acquiesence in the sale will be deemed *confirmatory*, unless he asserts the contrary.[3] The sale is not absolutely void—it is voidable only, and unless repudiated or voided by some act, it is confirmed by lapse of time—by the silence of the grantor, when he was aware of all the facts. He may repudiate it during non-age[4]; and, in order to ratify a contract made by him during infancy, the ratification must be in writing and signed by the party.

A sale to an infant is in somewhat the same unsettled condition as a sale by him. If the grantor knows that he is selling to an infant, he is bound, though the infant may not be, and is not, till after his majority is reached. If an infant fraudulently represents that he is of age and obtains the benefit of a contract, the court will not afterwards hear him in repudiation of it.[5] Generally speaking, where an infant has received the full benefit of a sale to, or by him,

[1] *Adams* v. *Loomis*, 22 Chy. 99; 22 Chy. 228. See *Boustead* v. *Whitmore*, 22 Chy. 222.

[2] *Re* Shaver, 3 Chy. Cha. 379; *Bennetto* v. *Holden*, 21 Grant 222 *Gallagher* v. *Gallagher*, 30 U. C. R. 415.

[3] *Featherstone* v. *McDonell*, 15 U. C. C. P. 162.

[4] *Gilchrist* v. *Ramsay*, 27 U. C. R. 400.

[5] *Bennetto* v. *Holden*, 21 Grant, 222; *Gallagher* v. *Gallagher*, 30 U. C. R. 415; *re* Shaver, 3 Chy. Cha. 379. See as to action on such a contract against the infant, *Bartlett* v. *Wells*, 31 L. J. Q. B. 57, and *De Roo* v. *Foster*, 12 C. B. N. S. 272.

he will not be allowed to disturb it, even if the parties can be put in the same position, unless there was undervalue. The first enquiry would be—in case a sale were the most beneficial—was the full value received. An infant cannot be compelled to complete a contract for the purchase of an estate, but he cannot recover his deposit money on the ground of his infancy, if he decline to complete the purchase; and an infant cannot enforce specific performance of a contract against an adult contracting party.[1]

There are several statutory regulations as to the sale of infants' estates. The usual course, though not the sole one adopted, is the sale by means of the High Court of Justice. The interests of infant owners of shares, or of whole estates, are bound by sale made under the direction of the court; but the court does not sell unless it is for the infant's benefit to do so, nor can it sell contrary to the directions of any will affecting the property in the hands of infants. Such a sale cannot be repudiated by the infant on his attaining his majority.

The guardian of infants cannot give a lease of their estate. Such lease is void, *ab initio*, unless sanctioned by the High Court of Justice.[2]

6. Lunatics. Under the term "lunatic," or person of "unsound mind," the Divisional Courts of the High Court of Justice include every form of incapacity to contract, or to deal with, or devise property, arising from mental derangement, whether such incapacity be slight imbecility or any of the various forms of insanity up to idiocy. The student will recognize two classes of people incapable of acting for themselves—classes that are medical rather than legal divisions.

1st. The insane who have or had no lucid intervals.

2nd. Idiots who were born incapables.[3]

[1] See cases in Addision on Contracts, page 1027.

[2] *Switzer* v. *McMillan*, 23 Chy. 538.

[3] *Young* v. *Young*, 10 Grant 265; *re* McSherry, 10 Grant 390.

Of insane persons, using that term as including all who are not constitutionally defective from their birth, a great many divisions are made, such as *monomaniacs*, *maniacs*, *demented*, &c. In all of these, though slightly in the latter class, there are *lucid* intervals. Within these periods the parties can contract and are bound by their contracts. A monomaniac, if his mental disorder does not affect his knowledge of what he is doing, is able to contract. The same applies, though more difficult perhaps to prove, in regard to persons afflicted with acute or chronic mania. Subsequent insanity has no effect of course on a contract —a man may contract one day and become insane the next, without affecting the contract. Once, however, that a man becomes insane, a contract made with him is always made on the supposition that the other contracting party can prove he was in his sound mind when he dealt with him. Ordinarily, if the imputation of insanity is raised, it must be proved by those asserting such a state of things to exist. But having established that at almost any prior time a person was actually insane, then if he recovered the use of his reason afterwards, and you dealt with him, the burden of proof will be thrown upon you to show that such recovery actually took place. The law will presume a continuance of the same state of things. It does not require proof that any person before it, is sane, unless when a commission issues for that purpose. All persons are assumed to be sane till the contrary is shewn—when the contrary has been shewn, then the law assumes a continued state of insanity till a return to sanity is proved.

A sale of real estate to or by a man of unsound mind by a person aware of the other parties insanity, is absolutely void, and cannot be confirmed on a return of reason. There is nothing to confirm. A new deed must be executed. But a sale made by a man in a lucid interval is as valid as if the person was never insane. The difficulty is to shew it was made in a lucid interval.

Every man is legally either sane or insane, though the capacity to contract is very slight, or perhaps altogether wanting in some persons of weak mind.

If a man's sanity is doubtful, a contract made with him must be under such circumstances, that the fullest scrutiny could discover no advantage taken of him. If in the opinion of those persons knowing him, he had sense or wit enough, as is commonly said, to make such or such a bargain, and had his own independent legal advice, then a client may take upon himself to trust to the facts as he hears them. But no professional man could of course take upon himself to decide what every other person could perhaps speak more accurately upon. The most that can be said is, if this man is in his right mind and knows what he is doing, the sale will stand.

Of course if the lunacy of either contracting party is not suspected, and if the contract is *bona fide* and fair, the sale will hold good[1]; at least if it is executed, or executed in part, so that the parties cannot altogether be restored to their original position.[2] But such a purchase may pass into the hands of a *bona fide* purchaser for value without notice, and be unimpeachable, even if the original sale was unfairly obtained from a lunatic.[3]

A person may be a lunatic in fact though not one in law. If a lunatic has property requiring management, an application can be made to the High Court of Justice, and if satisfactory evidence is laid before it as to the state of mind of the supposed lunatic, and of the necessity of a person or persons being appointed to have charge of his person and estate, an order may be made declaring such person a lunatic, and naming a committee of his person and estate. In case of a sale of his land, the committee executes for the lunatic. In partition suits, where one of the parties is a lunatic, and there is no committee, the court appoints a *guardian* to watch over his interests. The practice has been for the Registrar to execute the conveyances so far as the lunatic is concerned.

[1] *Beaven* v. *McDonell*, 9 Ex. 309.

[2] Addison on Contracts, 91, *Eccles* v. *Lowry*, 32 U. C. R. 640; *Francis* v. *St. Germain*, 6 Grant 641.

[3] *Re* McSherry, 10 Grant 390.

7. Other Disabilities. Besides the nature of unsound mind as unfitting a person from entering into a contract, there are other matters that a conveyancer may be called upon to advise in regard to the relationship of the parties. No solicitor could of course lend his name to a transaction where both parties were not free agents to contract. The confidential relationships furnish some examples occasionally to the Courts of worthless conveyances, where undue influence or pressure was brought to bear in making a contract or the appearance of one. A solicitor himself has to exercise great caution and can very frequently be thrown into a difficulty by being called upon to prove the fairness of a transaction, in which the other party not being a professional man like himself, has not been protected by independent legal advice. Where in any case there is great shrewdness and ability on the one hand, and great ignorance and inaptness for business on the other, and apparent unfairness in the transaction, there is always a suspicion of over-reaching; and though the Courts do not pretend to make bargains for people of sane minds, they are anxious to find out if there are two people in each bargain. Each must know his own rights and have a chance to know them, and must not be improperly hurried or deceived or forced into a bargain. Some bargains are so unlikely to be the result of the *consensus* of two independent minds, that the presence of independent advice is not a certainty they will stand.[1]

Persons who purchase or convey under duress may affirm or avoid the transaction whenever the duress has ceased.[2]

Persons completely under the influence of intoxicating liquors may be said to be in somewhat the same position, as regards contracting powers, as persons of unsound mind.

An alien is now under no disability.

[1] *Huguenin* v. *Baseley*, 2 White & Tud L. Cas. Eq. 547; *Bayley* v. *Williams*, 11 Jur. N. S. 236.

[2] Leith & Smith's Blackstone, page 315.

In Leith & Smith's Blackstone we read (page 313) as to disabilities by reason of crime:

"Persons attainted of treason, felony, and *præmunire*, are incapable of conveying from the time of the offence committed provided attainder follows; for such conveyance by them may tend to defeat the king of his forfeiture or the lord of his escheat. But they may *purchase* for the benefit of the Crown or the lord of the fee, though they are disabled to hold the lands so purchased, if after attainder, being subject to immediate forfeiture: if before to escheat as well as forfeiture, according to the nature of the crime."

III. SUBJECT MATTER OF THE CONTRACT AND WHAT LAW GOVERNS IT.

The subject matter upon which the conveyancer has to deal, is limited to lands and chattels, and any interest therein.

As regards real estate, the *lex loci rei sitæ* governs; so that lands outside this Province are disposed of according to the law of the country in which they are situate. If the parties live in Ontario, and the land is elsewhere, the Courts could act *in personam*, so as to carry out the contract respecting it, or complete whatever further formalities or assurances were required by the foreign law.[1] On the other hand, if the parties—whether non-residents or aliens—reside outside of Ontario, they are bound the same as residents, to comply with the formalities of our law.

The student need not be reminded that the law of England as to property was introduced into this Province as long ago as the year 1792. Notwithstanding the wide terms of the Provincial enactment effecting this transfer, it readily appeared that all the statute law of England, and indeed much of the customary law, was unsuited to a young

[1] The Act respecting short forms of mortgages expressly restricts its operation to land in Ontario.

colony such as Upper Canada then was, and so the Courts very soon held that the Act must be construed with reference to the circumstances and wants of the Province, rather than to the general terms of the enactment. The statutes of Mortmain, affecting gifts of land for charitable uses, were, however, held to be in force; and nearly all, if not all, the statute and common law relating to landlord and tenant—to writs of execution, etc., are in force here. An investigation of this would be a discussion upon the law of real property, which is outside of the present purpose of this work. The student must familiarize himself with the law of real property in England, before the year referred to, through the medium of their older text writers; must watch the legislation in England, such as Acts like the Trustee Relief Act, and others affecting conveyancing, and must ground himself in such subsequent matter as will be found in Leith & Smith's edition of Blackstone. It is necessary at the same time to keep abreast of the legislation made in our own Province. The Revised Statutes of Ontario contain all the statutory Provincial law on the subject, up to and inclusive of the year 1877, and the writer hopes that full reference will be made in these pages to all subsequent legislation affecting his subject to the end of the past session of 1881.

As to personal property, it may generally be said that the law of the domicil of the owner governs, but a case is not likely to arise in practical conveyancing where it will be of importance to consider this.

IV. SHORT FORMS.

The present and past Legislatures in this Province have copied the laws in the Mother country to a considerable degree, but in regard to the laws respecting Real Property, it is beyond question that we are much in advance. The facility for searching titles, and for safely recording the same, are far superior to what they are in England, and our Acts respecting short forms of conveyances have proved a great boon to the public.

The English system rests mainly on the fidelity with which conveyancing precedents have been followed. These, and the writings of many distinguished conveyancers, have resulted in establishing a sort of common law in this department from which no practitioner there would feel himself at liberty to depart. Their books are filled chiefly with precedents, and the reputation of the author is the best guarantee of their usefulness. The legislature has not come to the assistance of the general public with any forms of conveyance, and has not interfered in the law of real property to any great extent. Where the title is not in copyhold, the history of it is locked up in the breast of the family solicitor; and the general public outside of a few registry counties can know but little of their own or their neighbour's title.

In Ontario, on the other hand, precedents have not the same importance (perhaps not the importance they deserve) which they have in England. The English precedents were introduced here simultaneously with the law of property, and indeed, those in use now were taken from English writers, but reduced into less formidable limits. The statutory forms given are not prescribed by the legislature as conveyances which *must* be followed, but as precedents that may be used. It is clear that they will be followed with greater fidelity than those of the most distinguished conveyancer. They have a sort of implied sanction by a supreme authority.

The use of statutory forms of conveyances, mortgages, or leases, is liable to create a wrong impression in regard to their intrinsic efficacy. When the Acts are closely examined, it will be found that there is no absolute certainty guaranteed of their effecting the expected purpose, any more than before the Acts were passed. Viewed by themselves, they are incapable to effect anything that the same words and formalities would not have effected theretofore. They simply leave the duty of the conveyancer as it was before the statute, and come to his assistance only in lessening the description of such things as may be supposed to pass by the instrument, such as houses, outhouses, edifices, etc.,

and of being less minute in stating the covenants. But if the conveyancer includes all that is set out in sec. 4 of the Acts respecting conveyances and mortgages, and sec. 8 of leases, and uses the second or expanded column in regard to the covenants, he will have a conveyance quite as effectual as the statutory one. It is true that the words "lands," and "party," are defined in the two former Acts, but that is of no practical use except for brevity's sake. A conveyance under the statute is effectual or not to pass the estate in proportion as it would have been effectual before the statute—it is in effect a common law conveyance by grant, expanded by virtue of the Act, but it derives no other energy from the statute.

The conveyancer can avail himself or not of the Acts respecting short forms just as he pleases, and his first consideration will be, whether the Act will be of benefit to him, or whether the conveyance he is concerned in is of so special a nature that he can get along without any statutory energy, without any amplifying by virtue of the Acts. It is usual, unless with conveyancers of the oldest school, to get the benefit of the Act, for a word may, if left to itself, be dangerous, for how little or how much it may mean. Under the statute the expanded form is given, and the effect can be judged accordingly. In the convenants it is allowed to introduce into or annex to any of the forms in the first column, any express exceptions from, or other express qualifications thereof, respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column. It is not necessary either to use the *form* of the deed given; any other deed expressed to be made in pursuance of the particular Act or referring thereto, will, so far as the covenants in it are concerned, be taken to have the same effect, and be construed as if it contained the form of words used in column two of the schedule to the Act in question. Even if the reference was incomplete, it will be as effectual to bind the parties so far as the rules of law or equity will permit, as if the Act had not been made.

The conveyancer can therefore use as much or as little of the Act as he requires or chooses, and if the instrument be a grant, lease or mortgage of lands, he can use any form for the deed proper, and get the benefit of the statutes to expand his covenants, or he can use the statutory deed and abandon the covenants, or any one or more of them.

So far as the grant is concerned in each of the instruments, reference will be made hereafter to what is conveyed, unless an exception is specially made therein. In grants and mortgages the same things are included, except that in the former nothing is said as to the reservations, limitations, provisos and conditions in the grant from the Crown. In leases the list is much shorter, and in the Act respecting short forms of leases, if the premises are freehold, the covenants and the proviso for re-entry apply to the lessor, his heirs and assigns; if leasehold to the lessor, his executors, administrators and assigns, and the words "Lands" and "Party" are not defined or made part of the Act as in the other two Acts.

The other parts of the three Acts are, when viewed with their objects, identical.

It is chiefly as to the covenants that care must be taken. A covenant operating, under the statute, may be read to include the "heirs and assigns," or the "executors, administrators and assigns," while one, not having the assistance of the statute, may be construed a personal covenant. It is laid down in the English cases that in the power of sale in a mortgage, unless the "assigns" is inserted, the mortgagee only can sell. It is different under our statutory mortgage where the assignee is in the same position as the mortgagee. No case has laid down any rules as to when under the statute such or such a covenant will be construed to apply to the personal or legal representatives. The general law must be looked at.

The case of Brown v. O'Dwyer[1] is a late case on the construction of covenants, partly in the words of the short form

[1] 35 Q. B. 354.

and partly omitting them. It was held that it was not a covenant under the statute. The other covenants were, however, held to be statutory covenants. The distress clause in mortgages has received a restricted meaning, and it has been held that it is a mere license to take the mortgagee's goods, and does not warrant the taking of a stranger's goods on the mortgaged premises.[1] The Court of Common Pleas held, in a case similar to Brown v. O'Dwyer, above, that if a covenant omit the words "notwithstanding any act of the said covenantor," though it is not in accordance with the statute, it bound the covenantor as an absolute covenant, that he was seized and had a right to convey in fee simple.[2]

Notwithstanding all the ridicule that has been heaped on short forms, "algebraic conveyancing," there is no doubt but they are of immense advantage to the public. Besides the certainty, they are a great saving of expense, where, as in our Registry offices, the instruments are now entered at full length, and charged by the folio. The objections raised to them in England were more reasonable than might be supposed, but fortunately here these have no existence. After a purchaser had to pay fifty or a hundred pounds for the investigation of the title to a few acres, perhaps he would not object much to the additional costs of a lengthy assurance. The absence of registration facilities will always be a source of expenditure in the title to land—the perfection to which they are brought will be the best and simplest way to transfer real property. It is to be hoped that before every man becomes his own conveyancer, the government will arrange to have all transfers, &c., of land made in the Registry office under its own supervision, and for which it will be responsible.*

[1] *Laing* v. *The Ontario Loan and Savings Company*, C. L. T., July, 1881, page 423; and see *Trust and Loan Company* v. *Lawrason* now entered in the Supreme Court. See *post*.

[2] *McKay* v. *McKay*, 31 C. P. 1.

* Since the foregoing remarks on the efficacy of the Short Forms Acts were put in type, the judgments in *The Trust and Loan Company* v. *Lawrason*, in the Queen's Bench and in the Court of Appeal have come to hand, and the language of Mr. Justice Cameron and Mr. Justice Patterson is to the same effect as stated in the text.

V. RECITALS.

Recitals are to be found in all sorts of conveyances, but it may be generally said that they are essential to none. Under our statute, amending the law of Vendor and Purchaser and simplifiying titles,[1] they will be useful, as after twenty years they are assumed to be true, unless the contrary is shewn. They embody such facts, or what are believed to be facts, as may be necessary to render the instrument more intelligible, but usually they do no more than record these in writing—and frequently they lay bare whatever defects have been in the title. Where it may be a matter of doubt whether or not recitals should be inserted it will generally be safer to omit them.

VI. DATE.

No date is necessary in a deed, but a date is convenient, and if there is any date it will be assumed that it is the date of execution until the contrary is shewn. A false or impossible date can be corrected and read in view of the fact. A deed may be dated on one day and delivered on another, but a deed should not be dated on a Sunday. All sales and purchases, and all contracts and agreements for sale or purchase of any real or personal property whatsoever, made by any person or persons on the Lord's day, are utterly null and void.[2]

VII. DUPLICATE.

It is not necessary that conveyances of any kind should be made in duplicate, but it is usual and convenient to have them made so. The Registry Act requires an original deposited in the Registry office so far as instruments affecting land are concerned, but the parties would have no convenient evidences of their title if they retained no duplicates of the

[1] R. S. O. cap. 109.
[2] R. S. O. cap. 189, sec. 7.

transaction. The Registrar's certificate endorsed on the duplicate returned is evidence not only of the document, but of the registration of it. In practice all instruments affecting land are in duplicate excepting wills; and all are registered except leases not exceeding seven years where the actual possession goes along with the lease.[1] As between the parties, neither execution in duplicate, nor registration makes the transaction more binding or indefeasable.

The counter part of a deed is primary, and not secondary evidence.[2]

VIII. EXECUTION.

When the conveyance is complete so far as the engrossment is concerned, the particulars to be observed are few, but important.

If a person is unable to read or write, the deed should be read over to him, but the mere omission to read it over to him does not invalidate the deed[3]; though, if read differently from what it really is, there is no execution,[4] and if an illiterate or blind person require the instrument to be read, there is no sufficient execution unless this is complied with[5]; and it is laid down generally in the old authors that if the parties to the deed be illiterate, it ought to be read.[6] Any alteration necessary to be made should be made then, and any error corrected. A mis-description is a serious matter, and should be particularly avoided—a misnomer, though not a fatal objection if the party can be identified,[7] is sometimes unfortunate, and always slovenly. A description of the parties, though not necessary, may be useful for identification thereafter, and should be correct, and, if possible, be the same as in former deeds by or to them.

[1] R. S. O. cap. 111, sec. 37.
[2] *Houghton* v. *Kœnig*, 18 C. B. 235.
[3] *Doe d. Biggard* v. *Millard*, E. T. 3 Vic.
[4] *Hatton* v. *Fish*, 8 Q. B. 177.
[5] *Owens* v. *Thomas*, 6 C. P. 383.
[6] Shep. Touch. 1 cap. 4.
[7] *James* v. *Whitebread*, 17 L. T. 78.

The date or place is not necessary generally speaking, but in some instruments[1] the date is important, as a deed is presumed to have been delivered on the day it bears date.[2] A deed may have blank spaces, but it is not prudent to have it so, as this might invite the insertion of words fraudulently which has been done with cheques carelessly drawn up. It is of course no objection to erase or interline a word or sentence, but it is recommended to do the former by drawing the pen through the words, so that the original state of the document can be seen. It is desirable, though not essential, for the witness or witnesses to put their initials opposite such erasures or interlineations, but this chiefly to assist their memory in order that they can swear as to the state of the deed before execution. If the date is erased it is not to be presumed to have been done after execution.[3]

In grants and mortgages it is usual to have the instruments executed only by the conveying party, but in the event of any covenants being entered into by the grantee, his signature is essential to their validity. In a lease the lessor and lessee both necessarily execute the instrument, as there are covenants on both sides, and care must be taken that all the parties lessors and lessees execute, otherwise it may happen as in a recent case, that a party failing to execute would not be bound on his covenant to pay the rent.[4]

1. Signature. Signing is not essential to a deed though it should never be dispensed with.[5] All the parties should sign their names if they can do so, although it is sufficient if their names are written for them, even when they can write. A signature by a mark is of course sufficient, whether the person can write or not, but it is better to have marks only where the person cannot write. It is

[1] In bills of sale and chattel mortgages, where the registration must take place within five days after execution, in deeds under the Mortmain Act, etc.

[2] *Hayward* v. *Thacker*, 31 Q. B. 427.

[3] *Frazer* v. *Frazer*, 14 C. P. 70.

[4] *Piper* v. *Simpson*, 6 Ont. App. Rep. 175.

[5] *Judge* v. *Thompson*, 29 Q. B. 523.

not necessary that the parties sign at the one time, or in presence of the same witness, or in presence of each other; and no instruments require more than one witness, except deeds of land for charitable uses under the Statutes of Mortmain, or other statutes requiring two or more witnesses—instruments executed under powers requiring two or more witnesses and wills. It was attempted to compel executors who were empowered under a will to sell lands, to sign in presence of each other like arbitrators executing an award, but the Court held it unnecessary.[1] There is apparently no absolute necessity to put the hand on the seal in executing, or to state that you sign or deliver the instrument as your deed.[2] It is not decided whether, one partner signing the name of his partnership firm opposite one seal, the one or both partners can be held liable in the deed[3]; but where four parties, described as a collective body, and not corporate, signed and sealed a deed with their own names and seals, they were held to be individually bound.[4] And where one of two partners signed in the name of both in the presence of the other, and for him with his assent, though there was but one seal, it was held to be the deed of both,[5] and two or more persons may use the same seal.[6] Where a seal was set opposite to the name of the party signing, the document must be treated as under seal, though the testatum clause is, "I hereby subscribe myself, &c."[7]

A deed may generally be executed by an attorney, whose appointment is made by deed. The attorney should not be made a party to the deed, nor should he sign his own name. He executes by signing the name of his principal, and adding "by—— his attorney."

[1] *Little* v. *Aikman*, 28 Q. B. 337.
[2] *Hutton* v. *Fish*, 8 Q. B. 177.
[3] *Moor* v. *Boyd*, 23 Q. B. 459.
[4] *Cullen* v. *Nickerson*, 10 C. P. 549.
[5] *Moor* v. *Boyd*, 15 C. P. 513.
[6] *Ball* v. *Dunsterville*, 4 T. R. 313.
[7] *Whittier* v. *McLennan*, 13. Q. B. 638.

2. Sealing. The seals should be put on an instrument before there is any attempted execution. A person, signing a document on which the seal is omitted, should, after the seal is put on, acknowledge the seal and his signature.[1] No deed is ready for execution until the seals are put on; indeed it cannot properly be called a deed until then, and the fact that a party may intend to execute it as a deed, and though the testatum may declare it to be duly signed and sealed, will not make a deed of it. On the other hand, the case of Whittier v. McLennan[2] goes to show that even where the party was described in the testatum as simply "subscribing," the presence of the seal was sufficient.

What is a sufficient seal has been up in our courts several times. Although it may happen that an impression upon the paper without wax or any extraneous substance is a sufficient seal[3] still no risk ought to be run in the hopes that the deed may be brought within the limits of some boundary cases. A circular flourish O is not a legal seal,[4] nor will marking the paper opposite the signature with the end of a poker, be held to be a sealed instrument[5]; and it took the Court of Appeal to decide authoritatively that slits cut through the parchment, and a ribbon woven through so as to appear on the face of the instrument at intervals of the signatures, should be recognized as seals.[6] A deed may have its seal and signature torn or otherwise mutilated by accident, or the effect of time, without being invalidated.[7] The omission of a seal is discussed by the late Chief Justice Moss in the cases of Wright v. The Sun Mutual Life Insurance Co. and Wright v. The London Life Assurance Co.[8]

Execution by a corporation where sealing is the important part, deserves some special mention. The corporate seal

[1] *Ball* v. *Dunsterville*, 4 T. R. 313.
13 Q. B. 638.
[3] *Foster* v. *Geddes*, 14 Q. B. 239.
[4] *Nagle* v. *Kilts*, Taylor 269.
[5] *Clement* v. *Donaldson*, 9 Q. B. 299.
[6] *Hamilton* v. *Dennis*, 12 Chy. 325.
[7] *Doe d. Ellis* v. *McGill*, 8 Q. B. 224. *Todd* v. *Cain*, 16 Q. B. 516.
[8] 5 Ont. App. Repts. 218.

affixed to a contract or conveyance, does not render the instrument a corporate act, unless it is affixed by an officer or agent duly authorized.[1] It must be affixed by an officer to whose custody it is confided, or some person specially authorized, the officer or special agent, acting in consequence of the directing vote of the body or managing board of the corporation, as the case may be. The deed should then be signed by some officer of the corporation with, "In testimony whereof the common seal of said corporation is hereunto affixed," and the seal then affixed.[2] So far as our Registry Act is concerned, the Secretary or presiding officer may or may not sign a deed from a corporation.

3. **Delivery.** A deed is not properly executed by signing or sealing, or both. It must be delivered to the party entitled, or to some one for him. If not actually or presumably delivered, it remains an *escrow* until the condition of its detention be fulfilled.[3] No form of words is necessary to constitute the delivery of a deed as an *escrow*, but the facts and surrounding circumstances may be looked at, to see whether such was the intention of the parties.[4] Unless held as an *escrow*, the execution will be deemed complete, and the delivery of a conveyance implies that it will be executed.[5] This formality is the consummation of the instrument, after that the party making it can have no further control over it. A deed will be assumed to be delivered on the day it bears date,[6] and if the date is erased it is not to be presumed to have been done after execution, and even if it were so erased, the deed takes effect from its delivery.[7]

[1] *Jackson* v. *Campbell*, 5 Wend. N. Y. Repts. 572.

[2] Thornton on conveyancing, 23, and see therein as to requisites where there is no statutory directions as to execution.

[3] The deed cannot remain as an *escrow* in the hands of the grantee for the giving of the deed to him would be construed an absolute delivery. The purpose for which it is placed in the hands of a stranger must be duly announced. (Thornton's Conveyancing, page 8).

[4] *O'Connor* v. *Beatty*, 27 C. P. 203.

[5] *Whittier* v. *McLennan*, 13 Q. B. 638.

[6] *Hayward* v. *Thacker*, 31 Q. B. 427.

[7] *Fraser* v. *Fraser*, 14 C. P. 70.

IX. WITNESSING AND PROOF OF EXECUTION.

Unlike a will, a deed need not be signed by the attesting witness at the time of execution, nor indeed is it rendered invalid by the omission to do so at any time thereafter. The fact of sealing and delivery may be proved like any other matter of fact,[1] and an instrument may be proved by admission under the provisions of our Registry Act. A deed under a power of appointment may require not only an attesting witnesss, but two or three witnesses, who may be required to sign their names as on the execution of a will. No matter what solemnities are enjoined by the power, it is now sufficient if the instrument be executed in the presence of, and attested by, two or more witnesses in the manner in which deeds are ordinarily executed.[2] In conveyances under the Mortmain Act two witnesses are necessary.

None of the parties to a deed should be a subscribing witness thereto, nor should any of them take the affidavit of the subscribing witness. It is not necessary that the witness be of full age, but he should be old enough to be competent to give testimony on oath, and to understand the nature of an oath. Some sensible person not concerned in the transaction should be selected, and he should either know the parties, or take such a mental note of the transaction, as may enable him to identify them if necessary thereafter. It is not necessary that the witness should have known the parties, but it is often very desirable that he should know and identify them thereafter. Sometimes the handwriting has to be depended upon, and very often an attesting witness will say that he does not recollect the fact of execution, but that seeing his own signature to the attestation clause, he has no doubt that he saw the deed executed. But where the sister of the person said to have executed a deed swore that the signature was not in her brother's handwriting, the court held the deed to be a forgery, not-

[1] Leith & Smith's Blackstone, 342.
[2] R. S. O. cap. 98, sec. 10.

withstanding that the witness was a professional man, and deposed that he had no reason to believe but the signature was that of the grantor.[1] In the absence of contradictory evidence, such evidence of execution would have been sufficient.[2]

The statutory affidavit prescribed by the Registry Act, and which is generally necessary to be sworn before registration, is not free from the fault of being somewhat inconsistent on the face of it. For to swear in one paragraph that the deponent saw John Smith and Jane Smith his wife, parties thereto, sign the deed in question, and in the next to swear that he does not know the said parties, looks to the unlearned as something akin to perjury. It is usual, of course, to introduce witnesses to the parties—it is the least and sometimes the most that can be done, but whatever the Legislature meant by the paragraph about his "knowing" the parties, there is no doubt but it has given rise to inconvenience in many cases, and might be altered with advantage.

The several copies of the deed should be sworn to, not that it is necessary, but as a matter of convenience thereafter. A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry.[3]

No affidavit of execution is required to the seal of any Court of Record, or of any corporation; and as to corporations, the secretary or presiding officer may, or may not sign.[4]

X. ALTERATION, CANCELLATION.

Mutilation or defacement in a deed of grant regularly executed, cannot invalidate it,[5] and the cancellation of a

[1] *Duffy* v. *Smith*, 26 Chy. 428.

[2] *Maughan* v. *Hubbard*, 8 B. & C. 16.

[3] *Regina* v. *O'Meara*, 15 Q. B. 201, and see now Registry Act, R. S. O. cap. 111, sec. 44.

[4] R. S. O. cap. 111, sec. 48.

[5] An altered deed is a new deed, and where the parties consent to a material alteration after its execution, it will be inoperative unless followed by a re-execution as an original deed. *Coit* v. *Stockweather*, 8 Con. R. 289.

deed does not divest the estate which has passed by it.[1] Any alteration to be made, must be made at the time, and the instrument re-executed, and a person who has executed a deed is not bound by an alteration made in his absence, though made by his verbal direction; yet, if his acts done under this verbal direction are unequivocal, and consistent only with his positive consent, he is bound by it.[2] And a blank in a bond which was afterwards filled in with the consent of a party to it, was held to be no variance in a plea of *non est factum*, though it was not filled in, in the party's presence.[3]

In McDonald v. McDonald, where a deed of land purported to be executed in the plaintiff's favor was drawn up, delivered and witnessed, and sworn to, but afterwards torn up in a fit of anger, it was held that the plaintiff having collected the pieces and stitched them together, the land vested under this deed in the plaintiff.[4]

XI. REGISTRATION.

After execution—that is sealing and delivery—no other formalities are required by the parties. There is no Stamp Act in this Province like the one in England, and even where deeds are executed in England conveying lands in this Province, they do not require to be stamped under the provisions of the English Act, but are valid here without being stamped.[5] Registration is not generally necessary in any case as between the parties,[6] but it is a necessary protection to the grantee as against subsequent purchasers for value without notice who claim under a similar instrument duly registered. As regards personal property, an instrument not filed in the proper office is void, not only as to those

[1] *Fraser* v. *Fralick*, 21 Q. B. 343.

[2] *Martin* v. *Hanning*, 26 Q. B. 80.

[3] *Leonard* v. *Merritt*, Dra. 281.

[4] *McDonald* v. *McDonald*, 44 Q. B. 291.

[5] *Murray* v. *Van Brocklin*, 1 Chy. Cha. 300, per Mowat, V.C.

[6] Unless where prescribed by a statute affecting them, as with some private corporations, and conveyances under the Mortmain Acts must be registered.

which are so registered, but also as to creditors, whether registered or not.

Deeds should be registered as soon as conveniently may be after execution, as well to have the evidences of title in secure keeping, as to prevent the purchaser from being shut out altogether by a prior registration from a fraudulent vendor. In most cases there is no virtue in the registration *per se:* the deed transfers the land, and even if it were lost or destroyed the next moment after execution, the title in the vendee would be good, though the evidences of it would not be so patent. No particular time is assigned within which one is required to register an instrument, nor, with the exception of deeds of grant under the Mortmain Act, and bills of sale, and chattel mortgages, there is no necessity to register or file them at all, but it is the uniform practice to do so, and the omission may be serious loss to the party purchasing any interest under the instrument.

No instrument is registered before the patent, except those creating a mortgage, lien or encumbrance on the land.[1]

Where a lease for a period less than seven years, not requiring registration, as actual possession went with it, contains covenants to renew beyond a period of seven years, the latter circumstance does not render registration necessary. And so, where a lease was made for four years with covenant to renew for four years more, it was held that it did not require registration where actual possession went with it[2]; but all leases for a longer term than seven years, and all leases under that period where actual possession does not go along with the lease, are under the provisions of the Registry Act.[3]

Every deed of land sold for arrears of taxes must be registered within eighteen months after the sale, and all sales of land under any process issued out of Court must be registered six months after the sale,[4] in order to protect the purchaser from any intervening sale by the former owner.

[1] *Holland* v. *Moore*, 12 Chy. 296.
[2] *Davidson* v. *McKay*, 26 Q. B. 306; *Latch* v. *Bright*, 16 Chy. 653.
[3] R. S. O. cap. 111, sec. 37.
[4] R. S. O. cap. 111, sec. 76.

CHAPTER II.

TITLE TO REAL AND PERSONAL PROPERTY.

I. REAL ESTATE.

I. PRELIMINARY.
II. SOLICITOR'S ABSTRACT.
III. REGISTRAR'S ABSTRACT.
IV. VENDOR AND PURCHASER ACT.
V. CROWN GRANT AND EARLY REGISTRATIONS.
VI. PARTICULAR TITLES:
1. *Possession.*
2. *Wills.*
3. *Inheritance.*
4. *Decree.*
5. *Power of Sale.*
6. *Vesting Order.*
7. *Lis Pendens.*
8. *Mechanics' Liens.*
9. *Insolvency.*
10. *Tax Title.*
VII. OTHER ENCUMBRANCES:
1. *Liens.*
2. *Bonds.*
3. *Writs.*
4. *Arrears of Taxes.*

II. PERSONAL PROPERTY.

I. PRELIMINARY.
II. SEARCHES:
1. *County Court Office.*
2. *Sheriff's and Bailiff's Office.*
3. *Rent in Arrear.*
4. *Liens.*

I. PRELIMINARY.

In no part of the ordinary duties of a lawyer is there more responsibility than in the investigation of title to real estate, with a view to certifying to its good character. In a litigation, where the chances for and against success are considered in the progress of the case, the client comes, in

a great many instances, to regard the final issue as something he could not fairly expect any human being to decide upon; but when a title to lands is to be enquired into, he looks upon the enquiry as one capable of leading to almost mathematical certainty. Should the title turn out to be bad in his hands, notwithstanding any admonitions or reservations, it is not unusual to find blame cast upon the solicitor. This is especially the case with the man who will run no risks, but yet does not want the purchase to fall through —he wants the responsibility shifted to the shoulders of the solicitor.

Nothing short of experience will render a person competent to cope with all the little difficulties that may beset the enquiry as to a title being a good one, and this experience can be had only after the acquisition of a fair knowledge of the laws relating to real property. The student who hopes to become a good conveyancer must ground himself in the principles set out in Blackstone and Williams, as well as be familiar with the statute law of our own Province; he must be familiar with what is necessary to convey by express grant, or by implication of law—how title may be acquired in one person, and how lost in another—what dowers must be barred or released, what writs cleared out of his way, what presumptions he can trust, and what evidence, primary and secondary, he may require, or the next purchaser may require of his client. All these are but a small part of his duty, and will be set out more in detail immediately.

It will probably be better to make some observations on the practical steps to be taken in acting for the purchaser of a piece of land, on the assumption that his vendor is bound to furnish him with evidences of a good title.

II. SOLICITOR'S ABSTRACT.

At present it would seem that long abstracts—solicitor's abstracts—are not often required. But the vendor is bound to make out a perfect abstract, and an abstract which does not state with precision the material parts of all documents

and other facts affecting the title, is imperfect.[1] A full and sufficient abstract of title means a perfect abstract of such title as the vendor has.[2]

An abstract shewing a good title is not sufficient; it must be verified[3]; and a vendor is bound, at his own expense, to furnish a purchaser with copies of all instruments relating to the title which are not of record[4]; and so is bound where, prior to 1867, only memorials were registered. Where the title is a registered one the chain must be complete.[5] A Registrar's abstract does not seem to be sufficient evidence.[6]

As to what is a perfect abstract, see Keyse v. Haydon, 20 L. T. 244; Bird v. Fox, 11 Hare 40.

III. REGISTRAR'S ABSTRACT.

When it is impossible to make a personal search in the Registry office where the lands are situate, the first thing necessary is to get a Registrar's abstract beginning back, either at the patent of the Crown, or at a point from which it is certain that the title was unquestionably good. In the large cities, and especially in Toronto, the names of well-known estates—the Jarvis, the Crookshank, the Elmsley—are, with many others, considered good at the date held by the then owners, and a search beyond that is seldom made. However, what one person may take as good, another may reject, and, unless in a few cases, the tracing of title from the Crown by an experienced conveyancer, does not require a great expenditure of time.

Suppose the abstract books in the Registry Office, or the Registrar's abstract, contained, amongst others, the following entries:—

[1] Hayes' Con., page 147.
[2] *Blackburn* v. *Smith*, 2 Ex. 783.
[3] *Granger* v. *Latham*, 14 Chy. 209.
[4] *Re* Charles, 4 Chy. Cha. 19.
[5] *Kitchen* v. *Murray*, 16 C. P. 69.
[6] *Reed* v. *Ranks*, 10 C. P. 202.

INSTRUMENT	DATE.	REGISTRATION.	GRANTOR.	GRANTEE.
Patent	14 June, 1791	17 July, 1825	.....	John Brown.
B. & S.....	10 Mar., 1827	20 Mar., 1827	Eliza Brown....	John Smith.
G. & P.	11 July, 1830	16 Aug., 1831	John Smith	Henry Wood.
Mortgage...	16 Aug., 1831	15 July, 1832	Henry Wood	John Smith.
B. & S.....	16 July, 1828	15 July, 1832	John Curry.....	E. Bond.
A. of M	15 July, 1833	16 July, 1833	John Smith	M. Jones.
G. & P.....	16 May, 1830	16 July, 1833	E. Bond.....	E. Hughes.
Mortgage ..	1 June, 1830	11 Dec., 1834	H. Wood	F. Leduc.
Sh. Deed P'l	Dec., 1834	4 Jan., 1835	Sheriff	A. Ward.
B. & S.....	5 July, 1855	5 Aug., 1856	A. Johnson	J. Lynch.
Will.....	April, 1859	3 July, 1862	J. Lynch	George Moran.
B. & S.....	Jan., 1865	6 Jan., 1867	John Moran	James Taylor.
Decree.....	11 Aug., 1870	13 Oct., 1870	.....	John Wells.
B. & S.....	9 Nov., 1870	11 Nov., 1870	John Wells	Step. Moore.
M.	9 Nov., 1870	11 Nov., 1870	Step. Moore	John Wells.
Grant	16 July, 1871	21 July, 1871	John Wells	A. Wright.
V. O.....	25 Mar., 1872	8 June, 1872	Ct. of Chancery..	J. Walker.
L. P.....	9 Sept., 1872	12 Sept., 1872	John Doe, plff....	J. Walker.
Mech. L....	12 Oct., 1874	12 Oct., 1874	John Masson....	J. Walker.
D. of Bill...	4 Mar., 1875	10 May, 1875	John Doe.....	J. Walker.
Convey	5 July, 1876	10 July, 1876	John Late, official assignee.	J. Bell.
Tax Deed ..	3 Sept., 1878	4 Nov., 1878	The Warden and Treasurer of the County of York.	A. Jones.

In going over such an abstract with the deeds produced, something has to be noted at each step.

Let the student first of all divide up the *age* of his title, that is, from the issue of the patent to the time of his search, into two periods—one extending from the date of patent to within twenty years of his search, and the other during the remaining twenty years. As to the former period he will be easily satisfied—recitals in deeds to be accepted as true unless proved to be inaccurate, undischarged mortgages presumably paid, outstanding dower likely to be barred, etc., etc.

IV. VENDOR AND PURCHASER'S ACT.

For now, by Rev. Stat. 109, all recitals, statements, and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old are sufficient, unless proved to be inaccurate; as also all registered memorials of discharged mortgages.

Registered memorials twenty years old of other instruments, if executed by the grantor are good, if possession is consistent with the title, and receipts of payment in a registered deed good, unless proved inaccurate. But as the Act does not apply to matters arising within twenty years, evidence is required to satisfy one that the title is, during such period, what it appears to be.

V. CROWN GRANT, Etc.

The Crown grant is not usually looked into, though, when it is registered, as it may be by a sworn copy, it may be for the purpose of drawing attention to something special in it, and so ought to be read over.

In our supposed title the patent gives title to John Brown, and as Eliza Brown presumes to sell, it must be either as an heiress, or by virtue of some instrument not registered. At the great distance of time, nearly sixty years, it is not likely that one could get, or require, any better evidence than a recital in one of the early title deeds, that she is the only daughter and heiress of John Brown; and if the recital continues to state that she is unmarried, then any reference as to the formalities of a consenting husband may be dispensed with, and in case there is due execution of the deed to John Smith, a duly signed receipt for the purchase money, the usual covenants, and the necessary operative words,[1] then the property would appear to be vested in a new owner, John Smith. If such evidence be not forthcoming, but if possession has gone with the title, the title should be accepted. There should be no doubt that the grantee got the right parcel of land, and this must of course never be lost sight of in all the subsequent changes in the title.

A mortgage registered before the issue of the patent has the same effect as if made after the patent was issued.[2]

[1] See Taylor on Titles Introduction, page 5.

[2] *Watson* v. *Lindsay*, 27 Chy. 253.

John Smith now by deed conveys to Henry Wood, and Wood gives a mortgage back. The deed may be lost and you may have no copy, and the memorial may do little more than assure you which parcel was sold, and whether your parcel is part of it or not; John Smith may have had a wife, and, if so, she should have barred her dower. At the supposed date (1830), no separate examination or certificate was necessary. In all probability she is dead, and so the apparently outstanding dower will at a distance so remote be not a serious obstacle. Enquiry, however, should be made, and if no trace of her can be found, it will render it safer to rely upon the probability of her being dead.

Wood mortgages the place back to his vendor, no doubt to secure the purchase money, and you pursue your enquiries as to such mortgage until you find that it has been discharged, or get Wood's title extinguished by sale, or vesting order or decree. Of course, if no payment has been made on the mortgage debt within a period of ten years since it became due, the mortgage ceases to be a lien or charge on the land, and after twenty years the covenant for debt is gone. The mortgage may not be on the whole lot.

As to this, as well as all other conveyances, see that they refer to your lot, as after commendable diligence in ferreting out its history, it may be of no value to you in your present enquiry. Later on, you will find this mortgage assigned to M. Jones, who now stands in Smith's shoes, though the encumbrancé remains the same; if, however, neither Wood, Jones, Smith, nor the mortgage can be found, nor any evidence as to payment, or non-payment, but little, if any, risk will be assumed in passing the title after so great a lapse of time.

In the next entry you will find John Curry, most unwarrantably, as it would seem, selling to E. Bond, and it will be a relief to you, if it turns out to be a conveyance of some other parcel of land; but if not, then you must inquire how Curry could get title, if indeed he had title. The first thing to decide is, who is the last registered owner prior to the date of this deed, and going back you will find it to be

Henry Wood. He was the owner, and now Curry sells. He may be his heir, possibly his devisee, or a trustee under his will.

If you read over the deed conveying to Bond, you may find recitals to give you the required information; and later on you may find a deed of trust itself registered in full. If not, this may turn out to be a defect in the paper title not cured by any subsequent registration. It is not to be concluded by this that the title in the subsequent holder is a bad one; it may be cured by a possessory title, and, if not, the necessary evidence may be found outside the registry office. At the distance of time supposed, ordinarily there would either be many subsequent changes in the title in which the defect would be remedied or explained, or the new owner would acquire a title by length of possession. Where such a state of registrations would require further assurance, a quit claim deed could be asked from the former registered owner or his heirs.

In experience in almost every title something must be done to supplement the paper title, either in a remedial or explanatory way.

Assuming that Bond has a good title, and his deed having been regular in every respect, pursue such enquiry till you come down to your own vendor, getting rid as you proceed of all encumbrances, and noting whatever defect there is in any of the deeds as to dower, receipts covenants; also, as to special clauses, qualifying grants raising trusts, etc., relying on recitals only when they are over twenty years old, looking into discharges of mortgages, trust deeds, etc. The sheriff's deed given to A. Ward may be on a sale for taxes, and so may have been worth as little as the generality of such deeds, but by several statutes time cures their defects, and in an abstract a title seldom depends on a tax-deed—though deeds on execution of writs against lands are frequent, and not open to the same objections. A valid judgment must be found entered in the proper office, and the writ acted upon during its currency; but apparently it is

not necessary to make enquiries as to the return of the writ against goods, nor as to the advertisement.[1]

VI. PARTICULAR TITLES.

1. Possession. The deed from Johnson to Lynch seems a surprise, and on reading over the deed it may happen that no former owner is referred to by recital or otherwise. He may claim neither by inheritance nor by devise—may not be a trustee, but he may, when you look closer into the facts, have a title by length of possession. He may, under the old law, be in possession as against the true owner or owners for over twenty years, and under such circumstances that his title by possession—the parliamentary title—may be good. The *status* of the owners, when adverse possession began, and the state of the law then must also be considered. If the owners were under disability, such as infancy, lunacy, or coverture, this twenty years would not be sufficient, and if the land be wild land, then twenty years' possession would not in either case make a good title.[2] Again, it is only those who are the rightful immediate owners who are barred. It would not affect remainder men. The possession then must be continuous; indeed, so many points are necessary, and the evidence to pass such a title so extensive, that most purchasers would require either sufficient evidence that all the former owners are dead, or would require a certificate under the Quieting Titles' Act. Because, formerly, to be out of possession for forty years was no bar unless some one else was in possession,[3] and it must be shewn not only that the plaintiff is out of possession for twenty years, but that it is in the actual possession of another.[4] Where the adverse party is patentee of the Crown, one must shew that the patentee or his heir had knowledge of such possession, or must shew a forty

[1] See cases cited by Mr. Taylor—Taylor on Titles, page 111. A case is now pending in the Court of Appeal in reference to these points.

[2] R. S. O. cap. 108, sec. 5. 43.

[3] *Ketchum* v. *Mighton*, 14 Q. B. 99.

[4] *Lloyd* v. *Henderson*, 25 C. P. 253.

years' possession.[1] In title by possession, the whole of the land must have been actually cleared and occupied for the required time—the title to any part not shewn to be such is not good.[2]

2. Wills. The next change of title is where the last purchaser makes his will, and devises the land in question. A will over thirty years from its date proves itself, and the probate is ordinarily sufficient proof—if not proved then the execution must be proved—and proved conformably to the statute then in force, and the original will produced of course for that purpose. The exact terms of the devise through which the vendor claims, and the effect of the words used must be considered, as difficulties of construction often arise.[3] Legacies or annuities charged upon lands form a lien thereon; and where title is derived through a will it is necessary to see that any legacies or annuities charged on the lands therein have either been paid, or that the purchaser got a release from the legatee or annuitant. The probate is evidence of the testator's death, as well as of his having made a will,[4] and that the will was executed according to the law of the country where the testator was domiciled, but it does not decide the question of domicile.[5]

It may be said that a title derived from a will is regarded by conveyancers as the worst kind of title.

3. Inheritance. By the next conveyance, it will be seen that, although the property in the last case was vested in George Moran, it is now sold by John Moran, and it will of course be necessary to see how the latter has acquired his title. Assume that there is a recital in the deed that John Moran is the eldest son and heir of Elizabeth Moran, a sister of, and sole surviving heiress of, the George Moran. Prior to the V. & P. Act this recital, being within

[1] *Re Linet*, 3 Chy. Cha. 230.
[2] *Wishart* v. *Cook*, 15 Chy. 237.
[3] Taylor on Titles, Chap. Particular Titles, Wills.
[4] *Davis* v. *Van Norman*, 30 U. C. Q. B. 437.
[5] *Whicker* v. *Hume*, 6 W. R. 813.

the last thirty or forty years, could not be accepted as sufficient evidence of the truth of these matters. The matters are of the highest importance, and even if the recitals were upwards of thirty years old, they would not, it seems, prior to the Act referred to, be sufficient.[1] Now, however, they may be taken as conclusive. It would formerly be necessary to set about proving the pedigree of George Moran, and then, if the recitals were found to be corroborated by facts—by the possession of the land, and by all the circumstances of the case—the sufficiency of the conveyance may be arrived at. The same proofs are required by a conveyancer that would be necessary to establish a plaintiff's title in an action of ejectment at *nisi prius*. First, it would be required to prove that George Moran, the last owner on paper, died without issue, without having made a will, or a will disposing of this property. For this purpose, if letters of administration were issued to his effects in the Surrogate Court, that would be satisfactory. A genealogical tree should then be made out tracing the line back to George's father, who would inherit in certain contingencies, but it would not be necessary to go beyond him. In the present case, the marriage of George's father would have to be established by certificate, and then the number of brothers and sisters of George himself shewn; afterwards, the death of George without having made a will, and the fact that he left no children nor the child of any deceased child, and strictly, that if he had any children, none of them made a will disposing of the property in question. Where the title passes through any child from its father, then the legitimacy of the child must be established by baptismal entries within a reasonable period after the marriage. All the brothers and sisters of George other than Elizabeth must be proved to be dead without issue, and the entire number of the family must be proved. If of age, then it must be proved that they died intestate, but a certificate of baptism is not sufficient evidence of the exact age of a party, though it is good evidence of his legitimacy.

[1] Taylor on Titles, page 137.

It frequently happens that, in making a title by inheritance, the solicitor will have no material except voluntary affidavits or declarations, and these are of course no legal evidence, though they may carry sufficient weight to pass the title. Unless he can do this from affidavits or from presumptions of law, then he may be driven to the desperate resort of attempting to quiet the title under the Act for that purpose. In the latter event, if all the parties live in this country, and never went out of it, then it may be possible in some cases to get a simple title quieted in the course of a couple of years. But in a case of this kind, where secondary evidence would have to be resorted to, it may be worth consulting counsel, whether it will not be advisable to obtain title by length of possession.

4. Decree. In tracing title through a decree in the Court of Chancery,[1] the assurance that everything is correct is no more than in the case of an ordinary vendor. The court does not warrant the title, though it will uphold a sale conformable to the decree in a suit in which the proper parties are before the court and in which there was no fraud in obtaining the decree.

5. Power of Sale. The title having been traced from Wells to Moore, and the latter having given a mortgage back, we find the mortgagee, Wells, selling to A. Wright. The mortgage in this case should be looked into to see if Moore was entitled to notice before sale, and then to see if he got the proper notice. Wells may, under the terms of the power, be restricted to sell by public auction only; but it will be always necessary to see that the mortgagee, in exercising his power, kept strictly within its terms.

6. Vesting Order. The next registration shews that the property got into the Court of Chancery again. Vesting orders are frequently made in partition suits when a number of heirs would be necessary to convey, some of them infants perhaps, and others out of the country. It

[1] Or now in the High Court of Justice.

must be proved that the parties entitled were alive when the vesting order was made. This conveyance operates as an assurance, but the purchaser has no covenants from the heirs though he is entitled to such covenants, and probably he cannot be forced to take a vesting order instead of a deed of grant with the usual covenants.[1]

A vesting order is proof enough of the plaintiff's title;[2] but it must be shewn that all the parties to be affected can be bound,[3] and that they are alive, but they may be minors or lunatics, and that the decree is absolute,[4] and that the vesting order vests all interests, legal and equitable, in the plaintiff.[5]

7. Lis pendens. The next registration shews that a suit is being brought against Walker. This is got rid of by a certificate of the dismissal of the suit or action, and it is only necessary to look for the latter just as discharges of mortgages are sought for. Unless a certificate of dismissal appears, then there should be a decree registered, giving title in some other way. The policy of the Courts is not to allow a *lis pendens* on the files, as it ties up the property, and does not die out by lapse of time, as it well might, unless renewed.

8. Mechanics' Liens. A mechanic's lien of itself has no validity after ninety days, unless a suit is entered to keep it alive, and some substantial indebtedness is necessary to be proved before it will be registered. A suit, however, in which a *lis pendens* may be filed, only requires assertion, and sometimes has never anything else.

Both these form serious objections, and must be removed before the title can be passed.

9. Insolvency. In a sale by an official assignee under any Insolvency Act, the terms of the Act must of course be

[1] *Slater* v. *Fisken*, 1 Chy. Cha. 1.
[2] *Re Gordon & McPhail*, 32 Q. B. 480.
[3] *Slater* v. *Fisken*, 1 Chy. Cha. 1.
[4] *Clariss* v. *Elliss*, 6 P. R. 115.
[5] *Re Robertson & Robertson*, 22 Chy. 449.

corresponded with, though it may not be necessary to prove the actual Insolvency. The necessary resolutions for a sale—*en bloc* or otherwise—the advertisements and other usual preliminaries are essential.

10. Tax Title. In a tax title, a number of points following the Act are set out in detail by Mr. Taylor in his Treatise on Titles. The treasurer's return and the assessment are necessary data—then the warrant to sell—the distress made of the chattels—the requisite advertisement—the description of the lands—and the sale—are all matters to be looked into with a view to see if the former owner is cut out—then the time for redemption, the non-receipt of any payments, and lastly the deed to the new purchaser and its registration within the period of eighteen months after the sale.

Proof of taxes in arrear may be made in various ways, the simplest being the treasurer's warrant.[1] It is necessary to shew there was no sufficient distress on the premises;[2] that the warrant have a seal;[3] that they have been properly advertised[4]—but where two years had elapsed after the execution of the tax-deed, without its being questioned, no evidence of a due advertising is necessary[5]—and the sale properly conducted,[6] and no intimidation or undue influence,[7] and sold for the proper amount of taxes.[8] It must be shewn that there was an actual sale, and that some taxes were due,[9] and the production of the treasurer's warrant is now held sufficient evidence of taxes in arrear for the time mentioned.[10] The lands may be described as

[1] *Hall* v. *Hill*, 22 Q. B. 578.
[2] *Dobbie* v. *Tully*, 10 C. P. 432.
[3] *Morgan* v. *Quesnel*, 26 Q. B. 539.
[4] *Cotter* v. *Sutherland*, 18 C. P. 357.
[5] *Wapels* v. *Ball*, 29 C. P. 403.
[6] *Logie* v. *Young*, 10 Chy. 217.
[7] *Schofield* v. *Dickinson*, 10 Chy. 226.
[8] *Allan* v. *Fisher*, 13 C. P. 63.
[9] *Proudfoot* v. *Austin*, 21 Chy. 566.
[10] *Clark* v. *Buchanan*, 25 Chy. 559.

all patented,[1] or all deeded.[2] Under each of these heads a multitude of cases will be found in the reports, and any satisfactory epitome could not be made of them here.

The warden and treasurer are the proper conveying parties in a tax deed.[3]

VII. OTHER ENCUMBRANCES.

1. **Liens.** In deeds executed since the 18th September, 1865, there is no lien on the land for unpaid purchase money. Before that date the unpaid purchase money formed a lien, and the absence of a receipt was held constructive notice that the purchase money was not paid.[4]

Under our Revised Statutes, cap. 95, all lasting improvements made under a mistake of title by a person believing the land to be his own, entitle him or his assigns to a lien on the same to the extent of the value of the land enhanced by such improvements, or the Court may direct him, on keeping the land, to make such compensation as may be just.

2. **Bonds.** As to Crown Bonds there are none to affect lands since 1866, but it may be remembered that the statute[5] passed in 1873, intends only to deal with bonds relating to matters within the jurisdiction of the Ontario Government, and it does not release any land charged by such bonds before the 1st of January of that year. Bonds made to secure Crown debts within the jurisdiction of the Dominion Government, may still affect lands, and be registered in the Court of Queen's Bench at Toronto. It is not usual since 1873 to search for Crown Bonds. All Division Court Bonds made before 1st July, 1869, are effectually released as to liabilities incurred thereunder, both before and since that date.[6]

[1] *Brooke* v. *Campbell*, 12 Chy. 526.
[2] *Cook* v. *Jones*, 17 Chy. 488.
[3] *Ferguson* v. *Freeman*, 27 Chy. 211.
[4] *Baldwin* v. *Duignan*, 6 Gr. 595.
[5] 36 Vic. cap. 6, and see R. S. O. cap. 93.
[6] *Re Franklin*, 8 P. R. 470.

3. **Writs.** The important search, after the Registry Office, is in the office of the Sheriff, in order to see if any writs are in his hands against the lands in question. The writ, it may be remarked, is not directed against the lands in so many words, but against the owner, and binds all the owner's lands within the sheriff's county. The certificate from the sheriff should show that there are no writs now in his hands, and that there have been none for thirty days past, and no sale under the writs within the last six months. Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them.[1]

4. **Arrears of Taxes.** The searches as to taxes in arrears, for special improvements, etc., must not be omitted. The search for arrears of taxes is made with County Treasurer or City Chamberlain. The local rates can be found only by looking into the municipal by-laws.

TITLE TO PERSONAL PROPERTY.

I. PRELIMINARY.

Of title to such personal property as becomes the subject of Bills of Sale or Chattel Mortgages, very little can be said. There is none of that absolute certainty about the title to a chattel that pertains to realty, and it must be understood so by a client risking his money thereon; indeed, it very generally is so understood. Where the reputed owner of chattels is possessed of real estate, upon which the chattels in question are always to be found, there is little risk, chiefly because no man with any stake in the country in real estate can suddenly vanish from his creditors. As is said in another chapter, the personal chattels or personal estate very fairly represent the personal

[1] *Doe d. Auldjo* v. *Hallister*, 5 O. S. 739; *Doe d. Burnham* v. *Simmons*, 7 Q. B. 196.

covenant, and unless for the purposes of priority and expediency, a chattel mortgage is not much more valuable security than a note. Chattel mortgages are of course very generally taken as security from customers for debts and future advances, but they are not often taken as security for loans by those whose business it is to lend money.

The title to goods and chattels does not rest upon title deeds, nor in general upon documentary evidence, but it is founded *prima facie* upon visible possession and apparent ownership.[1] It would be impossible from the nature of the articles that a permanent record could be kept of them, and so no effort is made to register goods and chattels to the same extent as is done with real estate. When a sale of land is made, the transfer is always registered, but with a sale of chattels the registry is made only where there is no change of possession, and in all other cases of the transfer of chattels no deed or transfer at Common Law was ever made out, and of course no record of it kept. By the Common Law, the right of property in, and title to, goods and chattels may be transferred to a purchaser by a contract of sale without any delivery of the goods or payment of the price, so that after the bargain has been concluded the goods may become the property of the buyer, although they still remain in the possession of the vendor.

By the Act respecting mortgages and sales of personal property,[2] every sale of goods and chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing by a conveyance under the Act, and it must appear by affidavit that the sale is *bona fide*, and for good consideration, and not done to enable the purchaser to hold the goods and chattels so as to defraud the vendor's creditors. In order to give publicity to such transfers, the conveyance and affidavits must be registered in the office of the Clerk of the County Court within five days after the execution thereof.

[1] *Hiern* v. *Mills*, 13 Ves. 122.

[2] R. S. O. cap. 119, sec. 5.

The Act does not apply to registered vessels.

In cases not within the Revised Statute referred to, the general law is that the property in personal chattels may be transferred by actual delivery by deed or by a contract for sale,[1] but that a gift must be by delivery or by deed. Any other sort of gift is void;[2] but these questions and the provisions of the 17th sec. of the Statute of Frauds do not come within the scope of this treatise.

The possession of goods is only *prima facie* evidence of title to them—they may have been stolen, or the possessor may be only caretaker or custodian. In any of these cases the reputed owner could convey no undefeasible title against the true owner, although he may be entitled to hold them against all others. In case he be found to be owner in the County Court office, this may be taken at least as evidence that some one else believed him to be the true owner.

The difficulty with personal property is that it has no *situs*—it generally follows the domicile of the owner.[3]

II. SEARCHES.

1. **County Court Office.** A search should always be made in the office of the County Court in the county wherein the goods and chattels now are, or were recently, and of course if they are mortgaged, the mortgage should be discharged.

2. **Writs.** Searches should also be made in the proper offices of the Sheriff, and of the Division Court bailiffs.

3. **Rent in Arrear.** In case the owner is lessee of any premises, a receipt should be obtained from the landlord that there is no rent in arrear, and where the tenant does not pay punctually, an undertaking should be got from the landlord, that he is not to allow the rent to run in arrear beyond one payment, or that if he do so, the goods and

[1] Prideaux Con. 727.

[2] *Sharr* v. *Pilch*, 19 L. J. (Ex.) 113.

[3] See *Parkhurst* v. *Roy*, 27 Chy. 361, now in Appeal.

chattels shall be liable for the rent to the extent only of one payment in priority to the purchaser or mortgagee.

4. Liens. Enquiry might also be made whether any of the goods is the possessor's conditionally, as these, if valuable, would lessen the security.

NOTE.—If the case of *The Trust and Loan Company* v. *Lawrason* be reversed in the Supreme Court of Canada, distress clauses in mortgages of real estate may require to be considered. The point in this case is, shortly, whether in a mortgage of real estate under the Act respecting short forms of mortgages, with a clause for distress for arrears of interest, and an additional agreement on the part of the mortgagor that he "doth attorn and become tenant at will to the Company [the mortgagees], subject to the said proviso," the mortgagees are entitled to the position of landlord towards the mortgagor. If such be held ultimately to be the law then it is clear that a mortgage on the land may be as great an obstacle as if the owner of the chattels thereon was a mere tenant, and that this would have to be considered in searching the title where any considerable amount was at stake. As put by Mr. Justice Cameron in his judgment in the Court of Queen's Bench in this case, and by Patterson and Burton, Justices in the Court of Appeal, it looks as a fraud upon the Chattel Mortgage Act. The mortgage on the land would become a mortgage on the chattels, and yet require no registration. It will be a subject for the Legislature to consider whether such should be the law, or whether any agreement in a mortgage of land should secure to the mortgagee the extraordinary privileges of a landlord to the detriment of intervening judgment creditors of mortgagees of the chattels.

On the other hand, the mortgagee of the land may claim the personal chattels of his mortgagor as the recognized security for his interest. It is very questionable however, if he has a better right to them than a creditor whose claim accrues before his own. If it should so be decided, then the Legislature should compel a mortgagee of lands who proposes to look to the chattels of his mortgagor for arrears of interest, to give notice to that effect in the office where a chattel mortgage of such goods would be registered before he could distrain for them, and also that in no case should he have priority for more than *one* instalment of interest.

There seems to be no question, but that the two relations of tenant and mortgagor can be created by the one instrument.

See the elaborate judgment of Mr. Justice Cameron, in *Laing* v. *Ontario Loan and Savings Company*, 46 Q. B. 120, referred to *post*.

CHAPTER III.

AGREEMENTS.

I. PRELIMINARY.

II. VOID CONTRACTS:
- 1. *Immoral Consideration.*
- 2. *Contrary to Statute Law.*
- 3. *Contrary to Public Policy.*

III. VOIDABLE CONTRACTS:
- 1. *Infants, etc.*
- 2. *Mistake.*
- 3. *Failure of Consideration.*

IV. CONSIDERATION.

V. AUTHENTICATION OF CONTRACTS:
- 1. *Contracts requiring a Seal.*
- 2. *Written Contracts not requiring a Seal.*
- 3. *Statutory Requisites.*

VI. PLAN OF AGREEMENT.

VII. SUMMARY.

VIII. CONDITIONS OF SALE.

IX. SUBSEQUENT MATTERS:
- 1. *Discharge.*
- 2. *Transfer.*
- 3. *Merger.*

I. PRELIMINARY.

An agreement which is to be the basis of a subsequent conveyance is a document not to be executed without due consideration beforehand. Such a document is one highly important, and at the same time necessarily dangerous. For if it be worth anything at all, it is binding on the parties to the extent of its meaning, and parties the most relaxing before signing an agreement, may turn out to be most inflexible thereafter. Each party fancies he has conceded to his enemy all that he ought, and each is prepared to resent further concession. It is then that each word in the document is strained to the full tension of its legal and grammatical signification—each clause is weighed with judicial carefulness, if not with judicial fairness. Should a weak spot be detected in one side, it becomes formidable

for the other, and then the question speedily is asked, if the agreement can be specifically enforced in a Court of Justice. If not, either the agreement is altered, or the transaction falls through.

Even with the most skilful conveyancers an omission may occasionally take place, because, although a large part of the duty of a solicitor in drawing an agreement is asking for minuter particulars, yet it may happen that both parties to it may omit or disregard an item of importance.

In England, perhaps nine out of every ten sales of land are preceded by an agreement, having such sale in view; and in a country where the transfer was and is so elaborate and expensive, it is to be expected that no deed of land should be given until the particulars of the sale were drawn up and assented to by all the parties. A transfer there is a matter of months; and there being only a few register counties, the title is not easily reached, as with us. A number of circumstances justify the use of agreements there that do not apply here, where there are comparatively few of them. If the parties are satisfied with the title, the deed of grant from the vendor to the purchaser can be drawn up in a shorter time than an agreement for that purpose, and the solicitor can hold the instruments till he has satisfied himself of any executions or taxes against the property. This, though a loose and undesirable way, is, perhaps, the way in which the great majority of sales are effected in this Province.

Where an agreement is contemplated, then, it must not be forgotten that it is the important part of the transaction, being the foundation of the edifice of which the assurance is the completion.[1] It is, at all events, as important as any subsequent assurance prepared under it, as it is the basis of all future operations; and when it is signed it cannot be departed from without the consent of all parties—a consent that can seldom be obtained, and, in some cases, may not be sufficient.[2]

[1] Deane Conveyancing, 300.
[2] Greenwood Con. 1.

II. VOID CONTRACTS.

Contracts which the law will not permit, under any circumstances, may be referred to three classes.

1. **Immoral Consideration.** Contracts founded on an illegal, and therefore, a void consideration—as an immoral act, or future illicit cohabitation; or where the contract, either directly or indirectly promotes immorality.

2. **Contrary to the Statute Law.** Any contract contrary to the provisions of the statute law is void.

To this may be referred the case of a statute imposing a penalty and the contract to be in contravention of it; the sale of offices; simoniacal contracts, if such there be in this country; contracts to procure smuggling; carrying on business without license, or as in the case of unlicensed practitioners; contracts regarding the sale or purchase of land on a Sunday, or for any dealing within a man's calling or occupation on that day; and generally any contract in violation of the law, or in contravention of an Act of the Local Legislature or the Dominion Parliament.

3. **Contrary to Public Policy.** The third class of void contracts refers to such contracts as are contrary to Public Policy.

To this class may be referred a contract in restraint of marriage generally; a general restraint of trade; maintenance and champerty; contracts with alien enemies, and any contracts which obstruct justice or interfere with the public administration of affairs.

It may be said that a contract preventing a marriage with any particular person may be entered into; and that a contract for the partial restraint of trade or business, if founded on a valuable consideration, may be upheld.

An illegal consideration avoids a contract. But where there are several considerations for separate and distinct contracts, even if one of the considerations is bad, the remaining ones can stand; but if there is one entire con-

sideration for two several agreements, and one of these is for the performance of an illegal act, the whole is bad.

One illegal covenant may be struck out of a contract, and the others stand, where there are separate and independent covenants.

III. VOIDABLE CONTRACTS.

1. Infants, Fraud, etc. As to voidable contracts, very little need be said, after the remarks made in the Introductory chapter. A false representation is a sufficient ground to have a contract rescinded, but it must be made with intent to deceive; an innocent representation, even if untrue, is no ground of relief.

Fraud does not make a contract void: it is voidable at the option of the party defrauded—the guilty party cannot take advantage of his own wrong so as to avoid the contract.

Sales to expectant heirs are viewed the same way here as in England, so as to protect these parties from designing men[1]; and a sale at an undervalue to a person under whose influence the grantor is, is as objectionable as a gift under the like circumstances.[2] Unless undue advantage was taken of a drunken man, so as to get it at an undervalue, the sale holds good[3]; and to avoid a sale for value by a lunatic, it may be necessary to establish that the purchaser was aware of the seller's mental condition.[4]

2. Mistakes. As to mistakes in agreements, two leading cases will guide us to the law in their regard. In *Lansdowne* v. *Lansdowne*,[5] it was decided that no relief would be given in a mistake of *law*, except where the mistake is one of title arising from ignorance of a principle of law of such constant occurrence as to be supposed to be under-

[1] *Moray* v. *Totten*, 6 Chy. 176.
[2] *Mason* v. *Seney*, 12 Chy. 143.
[3] *Clarkson* v. *Kitson*, 4 Chy. 244.
[4] *Macdonald* v. *Macdonald*, 14 Chy. 545.
[5] 2 Jacob & Walker, 205.

stood by the community at large. The whole law on the subject is laid down at great length in the other leading case of the *Earl Beauchamp* v. *Winn*.[1] It was decided in this case:—

1. Where, in the making of an agreement between two parties there has been a mutual mistake as to their rights, occasioning an inquiry to one of them, the rule of equity is in favour of interposing to grant relief.

2. Although the parties have, subsequently to the agreement, dealt with the property, or other circumstances have intervened so that it may be difficult to restore them to their original position, the court will not, if a ground of relief is established, decline to grant such relief.

3. The rule *ignorantia Legis non excusat* though applying where the alleged ignorance is that of a well known rule of law, does not so apply where the mistake is of a matter of law arising upon the doubtful construction of a grant.

4. Acquiescence in what has been done will not be a bar to relief, where the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

3. Failure of Consideration. A contract may be avoided if there is a total failure of consideration; and if the thing purchased does not answer the description, the purchaser is not bound to take it, and may recover his money back.[2] But if he got what he bargained for, though it may be of no value, he is bound by it.[3]

IV. CONSIDERATION.

Every agreement may be said to require a consideration to support it; but agreements under seal, with one or two exceptions, are presumed, from the fact of the solemnities

[1] L. R. 6 E. & I. App. 223.
[2] *Azema* v. *Casella*, L. R. 2 C. P. 678.
[3] *Lamert* v. *Heath*, 15 M. & W. 488.

with which they are executed, to have been founded on a sufficient consideration; and, so far as the parties to the deed are concerned, nothing, ordinarily, will be heard to the contrary.

A contract not under seal—a simple contract—requires what is known to the law as a *valuable* consideration. There is another sort of consideration arising from motives of generosity, prudence, and natural duty, which is called a *good* consideration, such as blood relationship, or natural love and affection. A valuable consideration is founded on motives of justice, and may be money or money's worth, marriage, etc. A simple contract cannot be supported on a *good* consideration.

A good consideration is, however, sufficient in a deed as between the parties, but not as against a subsequent purchaser; and except in a bargain and sale, which requires a *pecuniary* consideration and a covenant to stand seized, which requires a *good* consideration, a gift implying no consideration is valid as between the parties, if made by deed.

What may be a valuable consideration is not always easy to define. A verbal gratuitous promise is not sufficient, nor is it sufficient that the person do something he was otherwise legally obliged to do. It is any benefit or advantage on one side, or any trouble, injury or inconvenience sustained on the other, even if there be no benefit to the opposite party; and either may be done to or for a third person at the request of the party promising. If the plaintiff part with anything that is of value to himself, though it may be of no legal value in the defendant's hands, to obtain the defendant's promise, that forms a valid consideration for the purpose;[1] the contract must be entered into for a consideration moving to the debtor himself, and not to a third party.[2]

[1] *Bradford* v. *O'Brien*, 6 Q. B. 417.
[2] *McLean* v. *Tinsley*, 7 Q. B. 40.

Every new contract requires a new or additional consideration, and bygone acts or services will not be sufficient unless done pursuant to a previous request.

V. AUTHENTICATION OF CONTRACTS.

1. Contracts Requiring a Seal. Some contracts require to be in writing, and some few require to be a writing under seal. All other contracts can be made by word of mouth.

Documents requiring a sealed instrument are:—

(*a*) Gifts, and all unilateral engagements.

(*b*) The conveyance of incorporeal hereditaments.

(*c*) All interests in land which the Statute of Frauds or R. S. O. cap. 98, require to be in writing.

(*d*) Authority of an agent who has to execute a sealed instrument.

(*e*) Contracts with Corporations, except where the contract is executed, and for trivial transactions, and generally the rule does not apply to trading corporations.

In regard to the first of these classes, it may be said that a deed is not required where the gift is capable of delivery, and where actual delivery has been made. But if there is no delivery, a gift must be by deed. A mere writing is not sufficient.

The conveyance of incorporeal hereditaments always lay in grant, and the grant must be by deed.

Of these are rights of common, rights of way, rents, annuities, and profits issuing out of land.

Licenses of pleasure, such as the right to shoot or fish on the property of another, or of profit, such as entering upon land to remove fixtures, must be by deed in order to be irrevocable. But licenses of profit may be good by a writing not under seal, if founded on a valuable consideration, at least they may give a right of action if the privilege is withdrawn. The licensed party under a parol license of profit has no rights against an assignee of the land; nor

has a mere licensee of pleasure, whose contract is only a personal one.[1] An easement can only be effectually granted, as has been seen, by a deed.

Reservations and exceptions, as of easements, rents, or services, arise only in deeds of grant. A reservation must issue out of the thing granted—an exception must be part of it.

An incorporeal hereditament in the nature of a profit *à prendre*, such as would descend to the heir, is assignable by deed in any way that the land might be: such as a right to dig and carry away ore, stone, clay or minerals. The term incorporeal hereditments includes such as rents, estovers common, and all other profits granted out of land.[2]

All interests in land as set out in the 4th sec. of the Statute of Frauds as requiring a writing must by our Provincial Statute be by deed.

It is a well known principle in law that an agent who is to execute a sealed instrument on behalf of his principal must be empowered by an instrument under seal.

Agreements entered into by corporate bodies will be referred to elsewhere in various parts of this work.

Other documents may require to be under seal by virtue of particular statutes, and of course almost any contract may be made by deed, so as to get the benefit of the doctrine of estoppel in regard to consideration, in order to bind the representatives of a covenantor, etc., etc.[3]

2. Written Contracts not Requiring a Seal.

(*a*) Agreements for the sale of any interest in land under the 4th section of the Statute of Frauds.

(*b*) Sales of personal property where there is no change of possession.

(*c*) Mortgages of personal property.

[1] See Addison on Contracts, 113-115.

An easement privilege or license, which is personal, cannot be assigned unless it is annexed or appurtenant to a tenement. Licenses of ferry are issued by the Lieutenant-Governor of the Province. R. S. O. Cap. 172.

[2] Co. Litt. 20 a.

[3] Assignments of Patents, of ships, etc., must be by deed.

(*d*) Ratification of contracts by minors.

(*e*) Wills of real or personal property.

Contracts within the 17th section of the Statute of Frauds do not come within the scope of this work.

The Act relating to mortgages and sales of personal property is intended for the protection of creditors and subsequent purchasers of the vendor.

Only matters immediately affecting the subject of conveyancing are considered here.

Any of the documents referred to as requiring to be made under seal, of course must be in writing; but there are a great variety of agreements and contracts which require to be in writing without being necessarily by deed. It is only in the department of conveyancing in our law as affecting an interest in lands, that a mere writing is required, and is sufficient for the inception of an agreement, and a formal sealed instrument is necessary for the completion of the purchaser's title. The written agreement conveyed the estate in Equity—the assurance under seal perfected the title in a Court of Law. As all the Divisions of our High Court of Justice in Ontario are now Equity Courts, it will remain to be seen how long the old distinctions are to last—to what extent one may expect to see a sealed instrument preponderate in intrinsic efficacy over an unsealed one. If our courts are to regard as done what ought to have been done, it may be within the region of possibility, that a plaintiff in ejectment may recover at *nisi prius* on a paper title without a sealed assurance to support it. The law, however, yet is that a purchaser must obtain his legal title, and the change made by the Judicature Act of 1881 is that he can get it in any of the Divisional Courts of the High Court of Justice. The phrase *in equity* seems to have lost its relative signification.

No transfer of any interest in land requires to be made by agreement as well as by assurance under seal. The latter is all that is necessary, though one may follow the other in the usual order.

Unless there are such dealings between the parties, as the law regards sufficient part performance, the agreement must be in writing.

A sale of property under the direction of the High Court of Justice is not within the Statute.[1]

3. Statutory Requisites. By the 4th section of the Statute of Frauds,[2] no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Every agreement which is substantially one for the sale of an interest in land must therefore be in writing, and the whole agreement must be in writing.

What is an interest in land?

Where the vendor is the legal or equitable owner of the land he proposes to sell, or where he has any share in the ownership of it, there is not much difficulty in answering this question, but where he has only a conditional title or a right in or over the land, it may not be so easy to decide. Where land is pledged by a bond for the payment of a debt, or where it is mortgaged, it has been held that the interest of the creditor is within the statute.[3] It follows from this that an agreement to assign a mortgage must be in writing. And it may be stated generally that wherever the conferring of any interest in land by one party is the consideration for the promise of the other, a writing is necessary even although the party agreeing to confer such interest may not at the time have been possessed of any interest in the land.[4] The agreement does not refer to any immediate transfer of an estate or interest in the land, but operates as a contract to make or execute or grant

[1] *Att'y-Genl.* v. *Day*, 1 Ves. 218.
[2] 29 Car. ii. cap. 3.
[3] *Toppin* v. *Lomas*, 16 C. B. 145.
[4] *Horsey* v. *Graham*, L. R. 5 C. P. 9.

or transfer or conveyance at some subsequent period.[1] Where anything is done which substantially amounts to a sale or parting with an interest in land, the contract is within the Statute.[2]

Contracts for the letting and hiring of furnished houses and lodgings by the day, week, or month, if they entitle the party to any specific apartments, must be in writing;[3] but a contract for board and lodging generally is not within the Statute,[4] nor is any agreement which is collateral to a sale of an interest in land as tenant's fixtures to be taken at a valuation.[5] Any collateral agreement may easily be brought within the Statute if its terms are mixed up with the sale of an interest on the land requiring a writing, or if the subject matter is accessorial to it. So agreements to make alterations and repairs in buildings by an intended lessee must be in writing if the principal subject-matter of the agreement is the letting of the premises.[6] Contracts for services in connection with the transfer of an interest in land, such as the investigation of the title, do not require to be in writing.[7] A contract for the sale of an easement must be in writing,[8] as must the occupation of premises for pasturing purposes.[9]

An assignment of a chattel interest in any land is void at law, unless made by deed.[10] The Rev. Stat., Chap. 98, (sec. 1.) defines 'land' to mean, "messuages, lands, tenements, and hereditments, whether corporeal or incorporeal, and to any individual share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land or any interest therein." It has been held under the corresponding Act in England, that the

[1] Sug. Ven. 94 n.
[2] *Kelly* v. *Webster*, 12 C. B. 290.
[3] *Edge* v. *Strafford*, 1 C. & J. 391.
[4] *Wright* v. *Stavert*, 2 Ell & Ell, 726.
[5] *Lee* v. *Gaskell*, 1 Q. B. D. 700.
[6] *Vaughan* v. *Hancock*, 3 C. B. 766.
[7] *Jeakes* v. *White*, 6 Ex. 873; and see cases in Addison on Contracts, 53.
[8] Chitty on Contracts, 283.
[9] *Smart* v. *Harding*, 24 L. J. C. P. 76.
[10] R. S. O., cap. 98, sec. 4,

statute only refers to legal estates, and so an equitable interest, such as an equity of redemption, may be assigned by a note or memorandum in writing, without being under seal.[1] A lease made by parol cannot, under the statute, be assigned without a deed, but a lease by simple contract for a term exceeding three years in duration, though void in law as a lease, will operate as an assignment. Fixtures, however, are neither goods or chattels within the meaning of the Statute of Frauds, nor do they constitute an interest in land though affixed to the freehold, and the same may be said of railway shares and of the profits of a mine.[2]

All assignments of leasehold interests must be in writing; but a lease if for three years or under, and for the full improved rental, or two-thirds of it, may be by parol.

As to growing crops, it is now well settled in respect to emblements or *fructus industriales* that a contract for the sale of them while growing, whether at maturity or not, or whether taken off the ground by the buyer or seller, is not a contract for an interest in land; but that a contract for the sale of a crop, which is the natural produce of the land, if it be unripe at the time of the contract, and is to be taken off the land by the buyer, is within the Statute.[3]

Having determined so far what is an interest in land, the other requisites of the Statute will now be examined:

1. The names of the contracting parties as such.[4]

2. The consideration.

3. The subject matter or object of the contract.

4. The signature of the party to be charged, or of his agent lawfully authorized.

As to the first of these statutory requisites, though the cases go the length of deciding that the agreement must

[1] *Stammers* v. *Preston*, 9 Jr. C. L. Repts. 355, C. P. An equity of redemption is more than a mere right or chattel interest, it is an estate in land.—Deane Con. 240-241.

[2] Per Parke Baron, 6 M. & W. 214; 3 Tyr. 959. See *Knight* v. *Barber*, 16 M. & W. 66.

[3] Chitty on Contracts, 283; and see *Marshall* v. *Green*, 1 C. P. D. 35.

[4] The memo. must specify the vendor by name or description. *Cameron* v. *Spiking*, 25 Gr. 116.

contain within itself the means of ascertaining the essential parts of the contract, but do not make it necessary that those parts should be precisely stated, still no one should run any risk by not complying with the statute in as express terms as it is possible.

In the case of *Cummins* v. *Scott*,[1] referred to by Mr. Justice Patterson in the more recent one of *Bland* v. *Eaton*,[2] in our Court of Appeal, the authorities are gone into very fully.

Sir George Jessel, M.R., says:—"In order that there may be a contract, at least two things are necessary, namely, contracting parties and subject matter of a contract. No doubt other things are necessary, such as proper words of contract, but at all events these two things must be."

And Mr. Justice Patterson in the case referred to in our own Court, says:—"These particulars [the subject matter, the terms and the contracting parties] need not be expressly stated *totidem verbis*. They may be deduced by reasonable inference if the language permits it."

Though the entire document must be in writing, it is not necessary that it should be contained in one writing but the separate documents from which it is sought to extract the agreement must have reference to each other and must point to the same contract.[3]

When it is stated that the whole agreement must be in writing it means that the real intention of the parties should be fully incorporated therein; for a defendant resisting the specific performance of an agreement against him may show by parol evidence that the written agreement does not represent the real intention of the parties to it, while the plaintiff could not use such evidence.[4]

The consideration if agreed upon must be inserted.

[1] L. R. 20 Eq. 11.
[2] 6 Ont. App. 73.
[3] *Bayley* v. *Fitzmaurice*, 8 E & B. 664.
[4] *Woolam & Hearn*, 7 Ves. 211.

The other statutory requisites are of course important; and if the solicitor acts for both parties he should see that both sign it. It is only necessary that the party to be charged signs; the party not signing may enforce the contract by decree, though it may not be enforced against him.

The signature is not necessarily at the bottom of the instrument nor does it matter where it is so long as the document is complete,[1] and initials[2] have been held sufficient and a printed signature if ordinarily used satisfies the requirements of the statute.[3]

Where one James Crockford wrote a paper beginning:—"I, James Crockford, agree to sell" it was held to be a sufficient signature.[4] When the agreement contains the names of the two contracting parties the subject matter of the contract and the promise, it is binding on the party signing it, although not signed by the other party.[5] Where a person signed "as agent of the vendors" and on the back of the papers the vendors were identified to be the "executors of Admiral F. deceased" this was held sufficient.[6] But this case, like the one of a certain vendor, who standing on his own farm agreed to sell "this place to B. at a fair valuation,"[7] is not for imitation.

As to agent's signature it may be said that an auctioneer is the agent to sign for both parties, but if the vendor is his own auctioneer then his signature will not bind the purchaser.

The agent must be a third person.

Until the hammer goes down the auctioneer is exclusively the agent of the vendor,[8] and the moment the sale is over the auctioneer is no longer the agent of either party,[9] and

[1] *Hubert* v. *Treherne*, 3 Man. & Gr. 743.
[2] *Phillimore* v. *Barry*, 1 Camp. 513.
[3] *Sanderson* v. *Jackson*, 2 Bos. & P. 238.
[4] *Knight* v. *Crockford*, 1 Esp. 190.
[5] *Bank of B. N. A.* v. *Simpson*, 24 C. P. 354.
[6] *Hood* v. *Barrington*, L. R. Eq. 218 Deane Con. 303.
[7] *Waldron* v. *Jacob*, Ir. Rep. 5 Eq. 131.
[8] *Warlow* v. *Harrison*, 29 L. J. Q. B. 14.
[9] *Mews* v. *Carr*, 26 L. J. Ex. 39.

he is not necessarily the agent of both parties for the sale may be made by him and the vendor not under the conditions of sale.[1]

VI. PLAN OF AGREEMENT.

The statutory requisites referred to are essential to the validity of an agreement unless in the case where a part performance excuses the necessity of a written agreement at all.

It may have all these, however, and not be a contract effectuating the intention of the parties, and so the subject matter or object of the contract must be prepared with great care. Greenwood, in his work on Conveyancing, page 2, says:

"In order to prepare an agreement properly the subject matter of it should be previously arranged in the mind of the draftsman, so that he may have a clear conception of the object in view and the manner in which it is intended to be carried out. * * * A precedent is seldom of much assistance in preparing an agreement, except by enabling the draftsman to form some idea of the manner in which it should be framed; the outline he may easily find, but the filling up, which is manifestly the most important part of the work, must be done by himself."

The same writer afterwards adds in reference to the introduction of mere words—verbiage—in an agreement:

"The proper way is never to introduce words in documents that have no meaning. A profusion of words encumbers a document and answers no useful purpose. The golden rule is, to express your meaning with clearness and brevity, to insert all that should be inserted, and to leave nothing to be inferred that ought to be expressed." (Conveyancing, page 4).[2]

After the usual preliminary clause, such as—"An agreement made the 10th day of June, 1881, between John

[1] *Bartlett* v. *Purnell*, 4 Ad. & E. 794.

[2] There is a conflict of precept and example in this passage.

Smith, hereinafter called the vendor of the one part, and Peter Brown, vendee of the other part," there is the usual clause:

1. That the said vendor (John Smith) agrees to sell, and the said vendee (Peter Brown) agrees to purchase for the sum of ($5000,) the fee simple in inheritance, and in possession of, and in all the lands, and particularly identifying them.

So far, it will be seen that the Statute of Frauds has been complied with—the signature to be inserted thereafter. Indeed, less specific terms may be used; for an agreement to sell generally, not expressing the interest in the subject, includes all the vendor's interest.[1] If nothing is said, it will mean the fee simple, in case the vendor had such an estate.

2. A second paragraph may then be taken up in reference to the completion of the purchase, the payments of the rents and profits after certain dates, in case the purchase is delayed for any cause, and generally the rights of the parties as to possession, rents and interest.

3. A clause should be inserted as to the title—the expenses connected with it—the title deeds or other evidences of title, and the time within which the title is to be examined, and the preparation and delivery of the deed and mortgage (if any), and the terms of the proposed mortgage. The terms of the mortgage ought to be precisely stated, so as to avoid trouble thereafter.

4. All right of ways, privileges, etc., should be considered, and be afterwards inserted in the deed, as unless they are, the agreement is itself no evidence, and merges in the subsequent assurance.[2]

The proportionate part of the taxes should be paid by the purchaser, or the agreement of the parties known in that regard.

5. If time is to be made of the essence of the contract,

[1] *Bower* v. *Cooper*, 2 Hare, 408.
[2] *O'Sullivan* v. *Cluxton*, 26 Grant, 612.

then a clause, making it clearly and expressly so, is to be inserted to that effect.

6. Attention should be drawn to insurance on the property pending the transfer. Where the contract transfers the equitable interest of the vendor, if the premises are burnt down thereafter the loss falls on the purchaser.[1]

These stipulations now receive the same construction in all courts.[2]

Care will have to be taken generally that you have the signatures of all the conveying parties. A man may agree to convey land, and it may turn out that he is only a part owner, or that he has only the equity of redemption. The conveyances the purchaser may be enabled to get in these cases will be more or less incomplete, and he may not choose to carry out a different purchase from what he intended.

The price may be at so much per foot, or per acre, and the exact quantity of the land may not be known. This is frequently a source of trouble, and should be suggested to the parties. The vendor will probably say it is so many feet or acres, "more or less," and although this common phrase may produce no inconvenience when the excess or deficiency is only a *few* feet, or a *few* acres, yet, when there is a discrepancy more than either of the parties expected, it has to be bargained for over again.

VII. SUMMARY.

To recapitulate then, it will be necessary to consider the following before the parties sign an agreement for the sale of land:—

1. Are all the owners parties vendors?
2. Are all the future owners purchasers?
3. Is the land correctly described; and is the interest

[1] But it is otherwise in a contract under a decree where, till the report on sale is confirmed, the sale is not absolutely final. See *Stevenson* v. *Bain*, 7 P. R. 258.

[2] Ont. Judicature Act, 1881, sec. 17. See *Taylor & Ewart*, page 51.

which the purchaser is to take fully set out; and is there to be any compensation for a deficiency?

4. Is the consideration set out?

5. Is there to be a mortgage taken back and if so, what are its terms?

6. When is possession to be given?

7. Is a good title to be shewn and how is this limited as to deeds, &c.?

8. What about the taxes, rates, &c.?

9. Are there any special covenants—any right of ways—easements—lanes—fences?

10. Is anything to be decided by a valuation—fixtures, crops, timber, &c.?

11. Who is to bear the expenses of the conveyance and searches as to title, &c.?

12. Is time to be of the essence of the contract?

13. Is any one of the parties an agent for any of the vendors or purchasers, and if so, is he lawfully authorized to sign for them?

14. At whose risk is the property till the transfer is complete?

VII. CONDITIONS OF SALE.

A sale by private contract embodies in the agreement therefor the terms of sale, and the particulars of the property. In a sale by public auction it is usual to keep the former—the conditions of sale—separate. In sales under the High Court of Justice, they are always separate or referred to as a distinct matter to which an intending purchaser must take heed. They are intended to restrict the purchaser's ordinary rights and as he has had no voice in their preparation it is essential that they should be clear and intelligible in stating to a man of ordinary understanding what he is not to require, and that they should not be of such a nature as to mislead or deceive him.[1] If too string-

[1] Dav. Con. 442.

ent they may have a bad effect on the sale, and if the vendor is a trustee he must guard against unnecessarily depreciating conditions in order that he may not become personally liable for any consequent loss.[1] On the other hand, as the undertaking is one in which you propose to defend your title against the whole world, it is important the title be carefully looked into, and its nature, tenure and its burthens plainly and distinctly stated[2]; and everything that a man intending to purchase requires, made known to him—providing against misrepresentation and misdescription[3] either of which might prevent the vendor from enforcing the contract. The terms on which the property is to be sold and the title such as the vendor can give, are of course leading clauses in the conditions. The agreement to purchase is drawn up by the vendors' solicitors, and incorporates by reference the conditions of sale. In Mr. Deane's excellent book on conveyancing will be found good instructions as to the points necessary to be noted in drawing up conditions of sale. But many of the conditions have ordinarily very little significance in this province.

1st Condition refers to the manner of conducting the sale —the *minimum* advance—the biddings, disputes as to them and instructions until the property is knocked down to some one. It also provides as to reserve bids.

2nd Condition provides for the payment of deposit at so much per cent. and the signing of a memorandum by the purchaser acknowledging that he has purchased the property at the price named, and subject to the conditions.

3rd Condition provides for a valuation of fixtures, timber and other trees.

Other conditions refer to the title to be shewn and expenses connected therewith; the payment of purchase money; possession, rents, interest; the time to complete purchase, and compensation for failure therein, and forfeiture of the deposit.

[1] *Dance* v. *Goldingham*, L. R. 8, Chy 902.
[2] Greenwood Con. 7.
[3] See *Brumfit* v. *Martin*, 30 L. T. 98.

The condition enabling the vendors to resell should always be inserted, as if it were omitted the vendors, though entitled to a lien on the estate, for the unpaid purchase money could only enforce such lien by a suit in Equity.[1]

IX. SUBSEQUENT MATTERS.

1. **Discharge.** An agreement required by the Statute of Frauds to be in writing, may before breach be discharged by parol. In *Goss* v. *Nugent*,[2] Denman C. J. said:

"As there is no clause in the Statute of Frauds which requires the dissolution of such contracts to be in writing, it seems that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing."

After breach a release must be under seal; but if made for a valuable consideration a simple contract will be sufficient. A contract may be discharged by alteration or cancellation as referred to heretofore.

2. **Transfer.** The party entitled to the benefit of a contract may assign it so as to place his vendee in as good a position as he held. (See chapter on Assignments.)

3. **Merger.** When an agreement under seal is drawn up in pursuance of a simple contract, as where a deed of grant is executed pursuant to a written agreement, the latter becomes merged in the deed, and this is material in conveyancing. It often happens that the agreement between the parties contains some particulars or covenants not inserted in the deed. Ordinarily in this case the parties can look no longer to the agreement but to the deed. And so where a purchaser had an agreement by which certain things were to be performed, and no mention of these were made in his deed, he is without remedy as they should have been inserted in the deed.[3] A suit may be instituted to make the assurance conform to the agreement, but until the necessary changes are made the Court will look only to the deed.

[1] Hayes Con. 171.

[2] 5 B. & Ad. 58.

[3] *O'Sullivan* v. *Cluxton*, 26 Grant 612.

CHAPTER IV.

SALES OF LAND.

I. PRELIMINARY.

II. RECITALS.

III. CONSIDERATION AND RECEIPT CLAUSE.

IV. GRANT AND FEOFFMENT.

V. NATURE OF GRANT:
1. *Life Estate.*
2. *Fee Tail.*
3. *Fee Simple.*

VI. DESCRIPTION.

VII. EASEMENTS.

VIII. HABENDUM.

IX. COVENANTS:
1. *Title.*
2. *Quiet Enjoyment.*
3. *Free from Encumbrance.*
4. *Further Assurance.*
5. *Production.*
6. *General Release.*

X. DOWER:
1. *Marriage Settlement.*
2. *Election.*
3. *Adultery.*
4. *Alimony.*
5. *Dower in Wild Lands.*

XI. SUBSEQUENT MATTERS:
1. *Vendor's Lien.*
2. *Interest, Costs, etc.,*

I. PRELIMINARY.

In acting for either vendor or purchaser, a solicitor may have to consider the contract as embodied in conditions of sale, or in a written agreement. Very frequently, however, in this Province, the parties having agreed upon the price and other obvious data, come to a solicitor, in order to have their "deeds" drawn up. Some observations on various matters connected with sales of land before a conveyance is executed, will now be given.

In all sales and purchases, the title is of course the first thing to be investigated; and where the purchase has been

made under a public auction, or where there is a written agreement, the terms of the sale must first of all be carefully looked into to see what the vendor has agreed to furnish, and what the purchaser is entitled to ask. An abstract is obtained and gone over, with such deeds as can be obtained. The question whether possession has gone consistently with the paper title, must not be omitted, and all the various points referred to in the chapter on Titles thoroughly examined and found satisfactory. Where there is a written contract, the particulars will generally be found embodied therein. And care must be taken that every thing in it material to the purchaser be inserted in the deed; because, after the deed is once executed, the agreement can ordinarily no longer be looked at. The agreement becomes merged—loses its existence in the deed of grant. And so, where the conditions, or agreement, speak of rights of way, or refer to plans, etc., the purchaser may lose the benefit of the terms of the agreement, unless they are secured to him in the deed.[1]

Revised Statutes of Ontario, cap. 98, contains what statutory law there is in reference to auctions.

There will generally be more difficulty where there is an agreement, than where property is bought at a public auction, or by private tender. In the latter cases, the purchaser generally buys the property on the vendor's own terms, without any variations. An agreement is, however, the result of letters or conferences, and it may happen that the parties are misled or mistaken. It may also happen that both would wish to reform the agreement. In the latter case, so long as an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it, postponing the period for performance, and no new consideration will be necessary.[2] So, where an additional year was granted to remove timber on premises sold, the vendor was afterwards

[1] *O'Sullivan* v. *Cluxton*, 26 Grant, 612.

[2] *Hurburt* v. *Thomas*, 3 Q. B. 258; *O'Donnell* v. *Hugill*, 11 Q. B. 441.

held not at liberty to revoke the extension.[1] But no variation can be made except by consent of all parties interested.

Where one party is misled by the other—where fraud is practised—the Court will set the agreement aside on the general principle that fraud avoids every transaction tainted with it.

Another frequent source of difficulty is the amount of land sold, which may be more, but is generally less, than the parties understood or represented. It is never an easy matter to adjust the amount of compensation where the parties agree to that being done; and there is no hard or fast rule as to when the Court will allow compensation to be made. Thus, in one case, 24 acres out of 200 was held not to be a subject for compensation,[2] while 56 acres out of 300 was allowed in another case.[3] And where the property was held out to be 96 acres, cleared and cultivated, and upon a survey it appeared to be that the cleared land was 74¾ acres under cultivation and legal fence, and 12¼ acres of pasture land never cultivated, this was also held to be a proper case for reduction.[4]

The growing crops on land are part of it, and go with the freehold when it is sold.[5]

A misdescription in a conveyance may be a ground for compensation, even after the conveyance is executed.[6]

An abatement may also be made in the purchase money, when the vendor's wife refuses to release her dower, as the purchaser is entitled to have it conveyed to him in some way.[7]

The objection that the agreement was made on a Sunday is a valid one, as such an agreement is void.[8]

[1] *Lawrence* v. *Errington*, 21 Chy. 261.
[2] *Follis* v. *Porter*, 11 Chy. 442.
[3] *Wardell* v. *Trenouth*, 24 Chy. 465.
[4] *Canada Permanent Building and Loan Society* v. *Young*, 18 Chy. 566.
[5] *Stewart* v. *Hunter*, 2 Chy. Cha. 335.
[6] *Bull* v. *Harper*, 7 P. R. 36.
[7] *Kendrew* v. *Shewan*, 4 Chy. 578; *Skinner* v. *Ainsworth*, 24 Chy. 148.
[8] *Lai* v. *Stall*, 6 Q. B. 506.

Where there is no agreement or conditions of sale, but where the parties come for the purpose of having a valid transfer made, the task of the conveyancer is simple, though responsible. The bargain has been made beforehand, but, when possible, the terms should be reduced into writing, unless the instruments are prepared, approved of, and executed at the same time.

The ordinary statutory forms of conveyances to be procured at a law stationer's, suggest a good many of the things to be attended to, and by attention to the details set out in the introduction, and the chapter on Agreements, there will be little difficulty in getting the blank form into an effective conveyance.

Revised Statutes of Ontario, cap. 102, is the authority for short forms of conveyances. The Act does not prescribe any particular form to the exclusion of others—it allows the widest latitude to any form of deed; but in order to get the benefit of the Act, the deed must be made in pursuance of it, or refer to it, no doubt for the purpose of incorporating the Act in the deed. The benefit of the Act is entirely in the expansion given to the covenants, and in the enumeration of the appurtenances, easements, privileges, etc., that are set forth in the 4th section. But there is otherwise no intrinsic efficacy in a deed under the statute, as was referred to in the Introductory Chapter. The deed follows the antiquated form of "This Indenture," etc., though deeds are no longer indented—the date follows, and then the reference to the statute—the parties—recitals, if any—the testatum clause—the consideration and receipt clauses—the granting part—the parcels, and the covenants, and provisos.

This is the ordinary and time-honoured form of deeds of grant, except that a *habendum* and *tenendum* were added in the old conveyances, which are not in the form suggested by the statute. The grant under the statute includes everything set out in section 4, as houses, outhouses, etc., etc., and conveys without a *habendum*.

A reference incorporating the statute can ordinarily do no harm; and the absence of it may leave the covenants

and conveying part shorn of much of their expected significance. The cases in which the statute cannot be used are quite exceptional.

II. RECITALS.

Recitals are divided by Mr. Deane, in his work on conveyancing, into two kinds; namely, narrative recitals, which set out the facts and instruments necessary to shew the title, and the relation of the parties to the subject matter of the deed; and introductory recitals which explain the motives for the preparation and execution of the deed. Narrative recitals have not been much used in this Province in the sense in which English conveyancers use them. The Registry offices here would shew nearly all that such recitals are intended to evidence. Our Act, corresponding to the English Vendors' and Purchasers' Act of 1874, which makes all recitals twenty years old at the date of the contract, unless proved to be inaccurate, sufficient evidence of the statements contained in them, will not, for some time, be so useful as the English Act. If introductory recitals are to come immediately after the narrative recitals, as Mr. Deane suggests, then it would seem that there would be no necessity for them at all. However, independent of technical classification, recitals are often used in conveyancing in this Province, and are likely to be availed of hereafter; but, in the simplest form of purchase deeds, they are not, even in England, introduced.[1] The tendency there is to do away with unnecessary recitals. The better rule seems to be, that recitals are necessary whenever the deed itself does not clearly imply for what purpose any person joining in it is made a party,[2] or whenever the covenants into which he enters shew that he has only a qualified interest in the property sold. From this it would follow that recitals are necessary in all cases where the property is vested in different persons, each having partial estates; or in trustees, or others selling under a power of sale; and also, whenever

[1] Davidson's Con. 43.
[2] 1 Prid. Con. 180.

the estate is subject to encumbrances which are noticed in the deed.[1]

In practice, in this Province, the latter fact is not always deemed special enough to be the subject of a recital. After the covenant in the deed, that the grantor has done no act to encumber the land, there is added a clause, "save and except a certain mortgage made by the party of the first part to A. B. to secure the repayment to him of $, and is dated day of 188 ." If the purchaser is to assume the mortgage, and covenant to pay the mortgage money, then it may be as well to recite these facts in the beginning of the deed, and insert the covenant amongst the other covenants.[2]

A recital is directed to be worded in very general terms, because, if it conflicts with the operative part, it will override and determine its significance.[3] A recital in a deed, though it estop the party asserting it from disputing its accuracy,[4] is still not binding on a purchaser, unless, according to the rules of evidence, it would be received as proof of the matters recited.[5] A purchaser may, however, be bound by conditions of sale requiring him to accept such recitals, unless they are rebutted.[6]

If the conveyance expresses, contrary to the fact, that the purchase money is paid, though the estate passes at law, yet equity will not permit the purchaser to possess and enjoy the estate for his own use, benefit and advantage, unless he pays down the purchase money.[7]

When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel

[1] Deane, 332.
[2] See *post* as to Special Covenants.
[3] *Jenner* v. *Jenner*, 1 L. R. 1 Eq. 361; *Rooke* v. *Kensington*, 2 K. & J. 753.
[4] Hayes on Con. 148.
[5] *Hills* v. *Laming*, 9 Ex. 256.
[6] Hayes, 148.
[7] *Winter* v. *Lord Anson*, 1 Sim. & Stu. 444.

is confined to that party, and the intention is to be gathered from construing the whole instrument.[1]

As between the parties themselves, any averment of a fact, made by one of the parties, in the nature of a representation or warranty, to the other, may be contradicted, and shown to be false, by that other.[2] But the party himself who makes the averment is not permitted to contradict or dispute the fact recited.[3] A recital may have the effect of a covenant as between the parties.[4]

The recitals in a deed may not be conclusive as to the facts therein stated[5]; and an erroneous recital will not necessarily bind the party claiming under the deed containing such recital.[6]

III. CONSIDERATION AND RECEIPT CLAUSES.

The general rule of law is, that no cause or consideration is essential to the validity of a contract under seal. In conveyances of land, however, that are intended to operate under the Statute of Uses, such as bargain and sale, and a covenant to stand seized to a use, a good consideration was deemed by the Court of Chancery to be essential. Notwithstanding that no money consideration ever passed in the former of these deeds, if a consideration be stated upon their face, the deed is valid and effectual, because no evidence could be admitted to contradict the deed.[7] In the covenant to stand seized, the good consideration is blood, or kindred, or marriage; this being established, the courts gave the covenantee the use of the land just as the money consideration in the bargain and sale raised a use on the

[1] *Strongbill* v. *Buck*, 14 Q. B. 787; *Wiles* v. *Woodward*, 20 L. J. Ex. 264.

[2] *Hayne* v. *Maltby*, 3 T. R. 441.

[3] *Humble* v. *Hunter*, 12 Q. B. 310.

[4] Addison on Contracts, 924.

[5] *Neale* v. *Winter*, 9 C. P. 394.

[6] *Lawlor* v. *Murchinson*, 4 Chy. 284. To those who deal in recitals, Mr. Hayes' rules (page 213, Conveyancing) will probably be of benefit, but they do not seem important enough to be introduced here.

[7] Addison on Contracts, 47.

vendee.[1] The profound reasoning that gave rise to this doctrine is not a matter of great practical benefit to a modern conveyancer. The courts, at present, do not find much difficulty in discovering what the consideration in a deed was, or whether there was any consideration at all.

As against a purchaser for value, a voluntary deed, though registered, is void[2]; and a sale at an undervalue, to a person under whose influence the grantor is, is as objectionable as a gift would be under the like circumstances.[3] The Voluntary Conveyance Act of 1868 gave effect as against subsequent purchasers to prior voluntary conveyances executed in good faith, and to them only.[4]

Conveyances of land among relatives give rise to difficult questions in regard to consideration. A man in difficulties, or foreseeing them, will frequently transfer his property to his wife, or other relative, and probably find out after an expensive litigation, that his grantee is only a trustee for his creditors. Still, some transactions of the kind may stand. Where a husband carried on a prosperous business, with considerable chattel property over his debts, bought land and conveyed it to his wife, who was instrumental in increasing his earnings, the transaction was upheld, when it was not proved to have been made with a view of placing the property beyond the reach of future creditors[5]; but it would be otherwise if the husband was in difficulties, and could not get credit, and was in debt.[6]

The case of *Lavin* v. *Lavin*[7] is one of the latest on voluntary conveyances, and cites the well-known cases on this subject.

The receipt clause in an ordinary deed is not taken as a receipt under seal; nor is the acknowledgment held to be a binding recital. It can, therefore, be shewn that no money

[1] Addison on Contracts, 46.
[2] *Buchanan* v. *Campbell*, 14 Chy. 163.
[3] *Mason* v. *Seney*, 12 Chy. 143.
[4] *Richardson* v. *Armitage*, 18 Chy. 512.
[5] *Collard* v. *Bennett*, Can. Law Times, July, 1881, 442.
[6] *Jackson* v. *Bowman*, 14 Grant, 156.
[7] 27 Chy. 567.

was paid, or that a different sum was paid from that mentioned. Occasionally, a receipt under seal is embodied in the deed, and this, of course, in the absence of fraud, would be conclusive. If the conveyance expresses, contrary to the fact, that the purchase money is paid, though the estate passes at law, yet equity will not permit the purchaser to possess and enjoy the estate for his own use, benefit, and advantage, unless he pays down the purchase money.[1]

Where a registered deed of conveyance acknowledges payment of the consideration money, such acknowledgment is sufficient evidence of payment, except so far as such acknowledgment is proved to be inaccurate.[2]

The only advantage of the endorsed receipt clause is that it relieves a subsequent purchaser from the necessity of ascertaining that the consideration was in fact paid,[3] and its absence may give rise to enquiry; but the parenthetical receipt clause in the body of the deed does not, it seems, estop a vendor from disputing the fact of the receipt,[4] unless it is followed by a formal release from all claims on account of the purchase money[5]; and it cannot in any case prevent him from disproving the receipt in equity.[6]

Where a vendor does not attend personally to receive the purchase money, the purchaser may insist on a written authority to pay to the vendor's solicitor, although a receipt signed by the vendor may be endorsed on the deed.[7]

IV. GRANT AND FEOFFMENT.

The student need not be told that formerly, in England, when the owner of tenements or hereditaments was owner in possession, and wished to transfer his estate to another, he

[1] *Winter* v. *Lord Anson*, 1 Sim. and Stu. 444.

[2] Rev. Stat. Ont., cap. 109, sec. 1.

[3] Dav. Con. 65.

[4] *Lee* v. *Lancashire Ry. Co'y.*, L. R., 6 Chy. 527-534; *Lampon* v. *Corke*, 5 B. & A. 606-611.

[5] *Baker* v. *Dewey*, 1 B. & C. 704.

[6] *Hawkins* v. *Gardiner*, 2 Sm. & Giff. 441.

[7] *Viney* v. *Chaplin*, 2 De G. & J. 468.

did so by a feoffment and livery of seisin. A feoffment was a formal statement by the owner that he gave it to the feoffee, and in order to complete and render effectual the conveyance, the possession of the land was formally given over to the feoffee. This was livery (delivery) of seisin, and both acts were required to be done at the same time; the estate took effect in possession at once. It is easy to see that if the estate was one in reversion, or remainder, except after an estate for years, no livery of seisin could take place. In order to sell these, a deed of grant was necessary, and a delivery of the deed to the grantee. This is what is meant, therefore, by saying that reversions and remainders were said to "lie in grant" and estates in possession to "lie in livery." In England, by 8 and 9 Vic., cap. 106, and, subsequently, in this Province, by what is now R. S. O., cap. 98, it was enacted that the immediate freehold of corporeal tenements and hereditaments should lie in grant as well as in livery[1]; so that not only reversions and remainders, but all estates in possession can now be transferred by deed of grant. But there is nothing to prevent a conveyance being made by feoffment and livery of seisin, should any person of antiquated taste choose so to have it. A feoffment is included in the word conveyance,[2] and the statute only requires that it shall be by deed,[3] instead of a parol statement. In the old deeds, the word grant implied a warranty of the title, and the grantee could sue on it as upon a covenant; but it has no such effect now, and under the Acts relating to the short forms, no extended signification is given to it. No additional efficacy whatever is given to a deed of grant under the Act respecting short forms of conveyance. It takes up a very simple form of conveyance as a model, and simply declares that if that form, or any other form of deed, be used, and that the instrument is made in pursuance of the Act, then you can use the abbreviated form for the covenants in column one, and they will be read as if the extended form of column two were used; and that unless an

[1] Sec. 2.
[2] Sec. 1, sub-sec. 2.
[3] Sec. 3.

exception be made as to houses, etc., the estate intended to be conveyed will include all houses, outhouses, edifices, etc., mentioned in sec. 4 of the Act. The Act takes its efficacy entirely from two sources—from chapter 98 of the Revised Statutes, sec. 2, where estates in possession are made to lie in grant, and from the Common Law of England, where reversions and remainders were always capable of conveyance by a deed of grant. But the Act does no more than lessen the length of a deed, and leaves any subtle questions about uses and trusts as they were before its passing. The estate is simply "granted" to the purchaser or grantee, and no *habendum* clause is introduced, so that it may, in its expanded form, be regarded as a common law deed of grant, conveying the land, but without any warranty or right of re-entry or covenant by implication in the word grant.

If this be the true construction of the statute, as the writer submits with deference, it leaves sec. 2 of the Rev. Stat., cap. 98, precisely as it was, so far as a statutory conveyance is concerned. The effect of the section is, as was intimated, to allow estates in possession to be conveyed by deed of grant. It is apprehended that the effect of this section is to put these estates on the same legal footing with estates in reversion and remainder, as if the common law always permitted a transfer by deed. If so, how is a conveyance under the short forms affected by the Statute of Uses? This was the difficulty in *Seaton* v. *Lunney*.[1] Land was there conveyed by the court to trustees, their heirs and assigns for ever, to have and to hold to the trustees, their heirs and assigns for ever, upon trust to permit the rents and profits to go to a married woman, etc. The court held there that the trustees took the legal estate, though counsel, who is now the present Chancellor, strenuously argued that the trustee was a mere conduit-pipe to pass the estate to another, and Blake, V.C., did not seem to object to that construction. Proudfoot, V.C., looking at the intention of the deed, held the trustees to be the legal owners, and that whether it operated

[1] 27 Grant, 169; *Ibid.* page 177.

as a bargain and sale, or as a grant. He says, "The word 'grant' can be construed to operate as a bargain and sale so as to effect this intention, and I think that ought to be the construction of it." With great deference to the learned Vice-Chancellor, the writer submits that there is no sufficient authority for this. A bargain and sale always transfers the legal estate, because of the use raised by a money consideration; and even though the consideration be one penny, or a pepper-corn rent, still no evidence can be held to question the consideration. The bargainee acquired the practical ownership of the land, which the Court of Chancery awarded to him, but it was not till the Statute of Uses that this use was "married to the law," as Coke says. After that useless enactment, the bargainee was the legal owner, and so the law remains to this day. How was it with a feoffment or grant? A grant to A. to the use of B. gave A. the legal estate at common law, which estate the Court of Chancery bound him in conscience to hold to the use of B, and then the Statute of Uses gave B. the legal estate. What difference does our statute make on this construction now? Surely not from the short forms Act, which uses the word grant simply, and has no *habendum;* and certainly not the Revised Statute, cap. 98, sec. 6, which has shorn the word grant of much of its common law meaning. It is submitted that before the trustees in *Seaton* v. *Lunney* could have got the legal estate, the grant should have been made "unto and to the use" of the trustees, and that no *habendum* was necessary. Instead of that, the grant was to them, their heirs and assigns, to hold to them, their heirs and assigns, upon trust, etc., and there was sufficient upon the face of the deed to rebut any inference of a money consideration which distinguishes and is essential to a bargain and sale.

A distinction is hinted at as to uses and trusts in the learned Vice-Chancellor's judgment, and probably the strongest point in favour of vesting the legal estate in the trustees is, that a trust is declared for certain purposes, and that there must be a use executed before a trust can arise. But there is no difference between this use of the words

"use" and "trust," and the distinction is unimportant, except historically. When the statute was exhausted in the first use, every subsequent use was declared by the courtesy of the Court of Chancery to be a trust. The same treatment was applied to trusts after the Statute of Uses as was applied to uses before it. (See *post Habendum.*)

V. NATURE OF GRANT.

Such interests as are usually comprised in a grant of land may be referred to in three classes. These are:

1. A life estate.
2. An estate tail.
3. An estate in fee simple.

The first of these is a freehold simply—the others are estates of inheritances as well. The Act respecting short forms of conveyances, it seems, does not apply to estates less than freeholds.

1. A Life Estate. Each separately, and both together, of the two former, are contained in the last, and any number of life estates in either of the other two. Chattel interests under leases may, to any number of years, be carried out of any estate of freehold; and the law still deems a residue—even in a life estate—remaining. So that A., enjoying an estate of freehold for his life, may, at the age of eighty years, make a lease for ninety-nine years, and the lease be a valid lease, though it endure only till the death of A.

Before considering what estate can be conveyed to a purchaser, it is manifest regard must first be had to the *quantum* of interest the grantor possesses. No freehold interest in life, in fee tail, or fee simple, can be conveyed by a grantor possessing a chattel interest, and, odd as it may be, the owner of an estate for nine hundred and ninety-nine years could not convey a life estate to his own grandfather. The impossibility of course would be greater in the other two estates of freehold, and so no lessee for years can

grant a life estate. Nothing short of a freehold will suffice. In England some corporations,[1] and infants,[2] have exceptional powers in this regard. The conveying words to be used when an estate for life is intended to be granted are simply, "to A." This is sufficient to give a life estate to A., and will give him no more. It is probably more usual to say, to A. to hold for the term of his own life, or some other person's life. Where a man holds an estate for the life of another, or others, he is a tenant *pur auter vie.* If the grantor has only a life estate, and convey a life estate out of it when he (the grantor) dies, the grantee's estate expires—as it also would on the grantee's death, before that of the grantor. But if the grantor has an estate of inheritance, the grantee will have the estate for his own life, no matter if his grantor die immediately after the grant. This is under the rule of grants, being construed most strongly against the grantee.

A lease or grant of lands for life cannot, by a common law conveyance, be made to commence *in futuro*; and, unless by instrument operating under the statute of Uses, the estate must commence on the date of execution of the grant.[3] Life estates are not usual in this country, though it frequently happens that parents reserve to themselves a life estate when conveying to their children. It will be worth while considering the mutual position of both parties where an estate for life is conveyed or reserved.

The legal incidents flowing from an estate for life being in question instead of a lease for years, should be explained to the parties. The grantee (or his heirs) is not to be prejudiced by the sudden determination of the estate, so as not to enjoy the fruits of his labours. He is entitled to crops sown by him, the emblements, corn-roots, etc., and also to the permanent or natural profit of the earth, as fruit, grass, etc.[4]

[1] 32 Henry VIII., cap. 28, 5 Geo. III., cap. 17; 5 & 6 Vic., 108.
[2] 18 & 19 Vic., cap. 43.
[3] Leith & Smith's Blackstone, page 163.
[4] Leith & Smith's Blackstone, page 132.

He is entitled to *reasonable estovers* or *botes*, but only for the purpose of the estate from which they are taken.[1] Though not allowed to cut down timber, he may fell timber for repairs. He may get stone for the purpose of doing repairs on the property of which he is tenant from any existing quarries on the estate; and has a right to cut underwood when fit for cutting, and to have for his own benefit the thinnings of trees, such as fir trees, which are planted for the protection of other trees rather than for profit[2]; and of timber cut for the necessary purpose of preserving or allowing the growth of other trees.[3] He can work mines already opened, if lawfully done by a preceding tenant, and even sometimes when opened after the settlement under which he claims.[4] He can rebuild buildings blown down by the wind, and fell timber for that purpose; but he has no interest in the timber till severed, even when he is not liable for waste, and when wrongfully severed, can receive no benefit from it. When timber is blown down, the course suggested is, to sell it, invest the proceeds, and pay the interests to the successive tenants for life, when there are such.[5] Timber in a decaying state may, when it is for the benefit of the inheritance, be cut down by the sanction of the High Court of Justice, provided that it is actually decaying, or is injuring the growth of other trees.[6] Otherwise, the tenant cannot cut down timber, though decayed, for any other purpose than that of doing repairs on the estate.[7] This is the effect of the decisions in England, where, of course, wood is more valuable than in Canada. Here, it is apprehended that timber may be cut down to cultivate wild lands, even by a tenant for life; but this would largely depend upon the quantity of woodland and clearing on the land in question, and upon other circumstances unaffecting

[1] *Lee* v. *Alston*, 1 Bro. C. C. 194.
[2] *Pidgeley* v. *Rawling*, 2 Coll. 275; *R.* v. *Ferrybridge*, 1 B. & C. 375.
[3] *Honeywood* v. *Honeywood*, W. N. (1874) 131; L. R. 18 Eq. 306.
[4] *Clavering* v. *Clavering*, 2 P. Wms. 388.
[5] *Bateman* v. *Hotchkin*, 31 Beav. 486.
[6] *Berwick* v. *Whitfield*, 3 P. Wm. 297; *Hussey* v. *Hussey*, 5 Madd. 44.
[7] *Perrott* v. *Perrott*, 3 Atk. 94.

the English decisions. It is not waste in a tenant for life to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry.[1]

If a tenant for life fells timber, or pulls down the house, the lessor shall have the timber; but if the house falls down, the particular tenant has a special property on the timber to rebuild the house.

The property on severed trees rests in a tenant for life without impeachment for waste.[2]

This case, and the case of *Garth* v. *Cotton*, 1 Vesey, 524-526, are the leading cases as to waste, and the powers of persons having estates not of inheritance. In our own courts see *Hebner* v. *Williamson*, 44 Q. B. 593.

Unless with a provision in the grant that the grantee for life is to enjoy the premises "without impeachment of waste," he is not, under ordinary circumstances, allowed to commit or permit any act of waste upon the property. He can neither pull down old, nor erect new buildings,[3] nor convert one species of land into another, nor open new pits for gravel, nor quarry for stone in new quarries. The saving words above referred to were formerly no safeguard against the committing of capricious or extravagant waste, such as pulling down the mansion house, cutting ornamental timber, etc., which the Court of Chancery regarded as "equitable waste," and extended its protection thereto.[4] These words are not now sufficient to justify equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating the life estate. See Ontario Judicature Act, 1881, sec. 17, sub-sec. 3.

The tenant for life has certain limited rights as to fixtures which were put up by him for the purposes of his trade.[5]

[1] *Drake* v. *Wigle*, 24 C. P. 405.

[2] Lewis Bowle's case, 11 Co. 79 b.

[3] *Caldecott* v. *Brown*, 2 Hare, 144.

[4] Per L. J. Turner, 3 De G. & J. 328, in *Morris* v. *Harris*.

[5] *Lawton* v. *Lawton*, 3 Atkin 12; *Dudley* v. *Warde*, Amb. 12; *Lawton* v. *Salmon*, 1 H. B. 259 n.

Things removable, without doing any damage to the freehold, may also be taken by him or his executors even, in a reasonable time after his death.

The tenant is entitled to the custody of the title deeds of the land of which he is in possession,[1] and can assign or surrender, and in certain cases easily recognized, can also devise his estate for life.

A conveyance "to B. and her children forever," gave B. only a life estate when there were no children at the time of the deed.[2]

A tenant for life of the whole estate of a testator, consisting of an improved farm, is bound to keep down the whole taxes,[3] and so is a devisee of a life estate.[4]

2. **Estates Tail.** In conveying estates of inheritance, the word "heirs" is necessary both at common law and under our statutes. To create an estate tail, additional words besides the word "heirs" are required, to restrict the extent of the grant to this lesser estate of inheritance. There are four classes of estates tail:

GENERAL.—To A. and the heirs of his or her body.

Male.—To A. and the heirs male of his or her body.

Female.—To A. and the heirs female of his or her body.

SPECIAL.—To A. and the heirs of his body begotten upon B.

To B. and the heirs of her body begotten by A.

To A. and B. and the heirs of their bodies.

And each of these again may be "heirs male" or "heirs female."

There may be a *quasi* entail, as where lands are entailed to A. during the lifetime of B., and to the extent of B.'s life

[1] *Duncombe* v. *Mayer*, 8 Ves. 320; *Bowles* v. *Stewart*, 1 Sch. & L. 209-223.

[2] *Shank* v. *Cates*, 11 Q. B. 207.

[3] *Biscoe* v. *Van Bearle*, 6 Chy. 438.

[4] *Gray* v. *Hatch*, 18 Chy. 72.

the course of the entail would be guided by the same rules as an ordinary estate tail.

No owner can create an estate tail unless he has in himself the fee simple.

Legal incidents of an estate tail are few but important. Of itself it is incapable of alienation, but the tenant in tail can convert his estate into a fee simple, and then has absolute control of it, as if it originally were such. He can also transfer it into a lesser estate. This conversion is called barring the entail, and is the subject of an intricate statute—R. S. O., cap. 100. This assurance must be registered within six months after execution, and be drawn up in regular form under the statute. The wife of a tenant in tail is entitled to *dower*, and so must be a party to a conveyance or mortgage of her husband's interest just as in an estate in fee simple. The same applies to the husband as to his *curtesy*.[1]

3. Fee Simple.—The limitation of this estate—the highest a subject can possess—is to the grantee and his "heirs." The word assigns is unnecessary, though usually added. In grants to a corporation capable of acquiring land, the words "and their successors" are used. There is no authority for saying that these words are necessary, and there is authority that they are superfluous. An agreement to sell a house or land generally, is an agreement to sell an estate in fee simple, unless the precise interest intended to be conveyed is otherwise specified, and the purchaser cannot be compelled to take a less estate.[2]

It is unnecessary here to enter into any elucidation of the incidents of an estate in fee simple. It is the largest estate in land which is permitted to a subject. It gives him the absolute use of it—liberty to use it in any way not injurious to his neighbour, or contrary to the law of the land. But he has not the absolute ownership—the *Do-*

[1] The case of *Lawlor* v. *Lawlor*, now entered in the Supreme Court of Canada, will decide a good many points regarding estates tail. The judgments may be looked for in Vol. V. of the Supreme Court Reports. The case will be referred to hereafter under Chap. Mortgages.

[2] *Hughes* v. *Parker*, 8 M. & W. 244.

minium, as was said before;—and for the public good, the Crown can take it from the subject, but on terms of compensation. When the heirs of the purchaser are exhausted, the crown steps in as *ultimus hæres*, and when he disentitles himself to protection, as by a felony, it may deprive him of further power over it. But ordinarily a grantee in fee simple has disposing power over it, to take effect either in his lifetime or afterwards; and with no impossible restriction so long as it is virtually his to dispose of. But in estates of inheritance, the purchaser's wife may be entitled to a share of the land; and the *quantum* of ownership must be considered with reference to her claim, and sometimes to the claims of his creditors, if any. Beyond these the owner's estate is practically untrammelled.

VI. DESCRIPTION.

Where the property is included in a registered plan, the latter must be referred to; and under our Registry Act, every survey subsequent to the one made by the Crown, and differing from it, must be registered.

In *Stevens v. Buck*,[1] the late Chief Justice Harrison collected cases bearing on the Crown surveys. He says: "It is usual for the Crown in this Province, before selling any of the public demesne, to have a survey made of it into concessions and lots, with appropriate numbers or other appropriate descriptions. It is also usual for the surveyor, when making the survey, to place posts or other suitable monuments, so as to designate the concessions and lots on the ground. It is also usual for the surveyor to report his work to the Crown Lands Department, and to accompany the report with his field notes, and a plan shewing the survey in detail.

It is competent for the Crown to adopt or reject the survey; but when it adopts it with or without amendments, and makes grants in pursuance of it, these grants are controlled by the survey.[2] In deciding conflicting claims be-

[1] 43 Q. B., pages 5-7.
[2] *Martin* v. *Crow*, 22 U. C. R. 485.

tween the grantees of the Crown, or those claiming under them, it is necessary to have regard not only to the language of the grants, but to the actual work on the ground, if the same can be traced.[1] If there be no work on the ground, the plan as adopted may be held to govern; but where there is work on the ground, and the latter is inconsistent with the plan, the work on the ground must govern.[2] If the plan and the grant conflict, it may be that the grant would be in some measure controlled by the plan, but where both agree, and there is no evidence of work on the ground, effect must be given to the grant according to the description therein contained, so far as the same can be traced on the ground.[3]

The description in the grant may be so worded as to be entirely controlled by the plan.[4] All lands are supposed to be actually surveyed, and the intention of the grant, unless the contrary plainly appear, must be held to convey the land according to the actual survey.[5] If a survey has been made but inaccurately, and there be no evidence of work on the ground, the inaccurate survey must yield to a subsequent accurate one, for in law the angles of a lot must be considered to be ascertainable with mathematical certainty.[6] Where the question is as to the construction of a particular grant from the Crown, other grants from the Crown may be received to assist in the construction.[7] But where the construction of the first grant is clear, a subsequent grant cannot be allowed to control it.[8]

[1] *Dunn* v. *Turner*, 3 U. C. R. 104; *Carrick* v. *Johnston*, 26 U. C. R. 69; *Smith* v. *Clemas et al.*, 20 C. P. 213.

[2] *Carrick* v. *Johnson*, 26 U. C. R. 69; *Iuson et al.* v. *Reynolds*, 34 U. C. R. 174, 199.

[3] *McEachern* v. *Somerville*, 37 U. C. R. 609, 620.

[4] *O'Donnell* v. *Tiernan*, 35 U. C. R. 181.

[5] *Martin* v. *Crow*, 22 U. C. R. 485; *McGregor* v. *McMichael*, 41 U. C. R. 128.

[6] *Thibaudeau* v. *Skead*, 39 U. C. R. 387; *Forsyth* v. *Boyle*, 28 C. P. 26, 33.

[7] *Clark* v. *Bonny Castle*, 3 O. S. 528.

[8] *Davis et al.* v. *McPherson*, 33 U. C. R. 376; *Martin* v. *Crow*, 22 U. C. R. 485; *Harrison* v. *Frost*, 34 U. C. R. 110.

If a lot be granted by a certain name, and it be clearly shewn what the lot so named contains, the lot so named is the governing feature in the description.[1]

Where a particular description is given, as by metes and bounds, and the latter is inconsistent with the description of the lot so named in the grant, the particular description must be set aside.[2]

Every survey different from the Crown survey must be registered in the proper registry office, and all instruments affecting that land, or any part thereof, executed after such plan is filed with the registrar, must conform thereto, otherwise they shall not be registered.[3]

It is best always, unless when a new survey has been made, to describe the parcels the same as in the former title deeds; and even when a subsequent plan has altered the description, a reference may be made to former descriptions, "but without specifying the deeds in which they are so described" as the occupants.[4] It is not usual or desirable in this Province to draw a map or plan of the property on the deed. Should the plan prove inaccurate, it may override the portions of the deed inconsistent with it.[5]

The modern doctrine, in interpreting the meaning of a grant or other instrument, is to ascertain the surrounding facts at the time the same was made[6]; but no conveyancer should trust to the action of the court in deciding what parcels he wishes to include in his deed. Of two descriptions in the same deed, a specific description given clearly will govern a general one preceding it, even if different lots are in question[7]; but a particular description, clearly inaccurate in many respects, does not control a previous

[1] *Iler* v. *Nolan*, 21 U. C. R. 309, 319.

[2] *Jamieson* v. *McCollum*, 18 U. C. R. 445; *Wigle* v. *Stewart*, 28 U. C. R. 427; *Gillen* v. *Haynes*, 33 U. C. R. 516; *Haynes* v. *Gillen*, 21 Grant 15.

[3] R. S. O., cap. 111, sec. 82.

[4] Deane Con. 335.

[5] *Lyle* v. *Richards*, L. R. 1, H. L. 222; *Davis* v. *Sheppard*, L. R. 1 Chy. 410.

[6] *Nolan* v. *Fox*, 15 C. P. 565.

[7] *Doe d. Murray* v. *Smith*, 5 Q. B., 225; *Llewyllen* v. *Jersey*, 11 M. & W. 183.

grant so as to exclude the part of that lot not described.[1] On the other hand, a general description being wholly insufficient, the particular description by metes and bounds that followed and was complete in itself, is allowed to govern[2].

Boundary to one chain of a river means to the edge of the water, not of the top of the bank[3]; and high water mark is the highest ordinary state of the river on an average.[4]

VII. EASEMENTS.

An easement is a privilege which the owner of one neighbouring tenement has of another, existing in respect of their several tenements, by which that other is obliged to suffer, or not to do something on his own land for the advantage of the possessor of the easement.[5] Easements and appurtenances legally belonging to land pass with it without any express words of grant,[6] and no amount of verbiage, so common in this part of conveyances, will convey any easement not already legally belonging to it. The rule recommended is to word the clause generally, without specifying any particular rights or easements; since otherwise the accidental omission of any of them might prevent its passing by the conveyance.[7]

An agreement to grant an easement will not necessarily be for an easement in perpetuity.[8] In *Kerr* v. *Coghill*,[9] the passing of easements under the Short Forms Act is considered. A water-course, having its origin *ex jure naturæ*, and not from grant or prescription, is not extinguished by unity of possession; but this is not the case with a right

[1] *Jameson* v. *McCollum*, 18 Q. B. 445.
[2] *Hart* v. *Bown*, 10 Chy. 266.
[3] *Stanton* v. *Windeat*, 1 Q. B. 30.
[4] *Plumb* v. *McGannon*. 32 Q. B. 8.
[5] Gale on Easements, 1.
[6] *Colegrave* v. *Dias Santos*, 3 Dow. & R. 255.
[7] *Halliday* v. *Denison*, 4 Jur. N. S. 1002; also Hayes on Con., page 209.
[8] *Craig* v. *Craig*, 2 App. 583.
[9] 25 Chy. 179.

of way, except a right of way of necessity, as a way to market or church.[1]

Prior to our Statute of 1880[2] an easement would be legitimated in twenty years, if affecting private property, and not a nuisance.[3]

See *Burnham* v. *Garvey*,[4] as to the law on prescriptive rights before the enactment referred to.

An easement can only be granted by deed; one given by parol cannot be revoked at any time.[5] The nature of its enjoyment is determined throughout by its character at the time of the grant.[6]

IX. HABENDUM.

To have and to hold. The *habendum* part is intended to define the estate of the purchaser; its proper office is to limit, explain and qualify the words in the premises, provided it be not contradictory or repugnant to them.[7] It determines the estate as either the same, or less, as stated in the grant, but it never gives a greater estate. Care must be taken that the grant correspond with the *habendum*, and *vice versa;* as if an estate in fee be contained in the grant, then restrictive words in the *habendum* may be regarded as a limitation, and, if repugnant to the grant, void.[8] If inconsistent with the grant, the former also governs.[9] Where, in an assignment, the granting part of the deed mentions only the indenture, the estate will pass if it be mentioned in the *habendum*.[10]

In a recent case, where the *habendum* was in fee, and the grant otherwise regular, a proviso was inserted at the end

[1] *Jury* v. *Pigott*, Poph. 166.

[2] *Regina* v. *Brewster*, 8 C. P. 208. See *Kerr* v. *Coghill*, 25 Chy. 179; *Mykel* v. *Doyle*, 45 Q. B. 65.

[3] Ont. Stat., 43 Vic., cap. 14.

[4] 27 Chancery, 80.

[5] *Crysler* v. *Creighton*, E. T. 2 Vic.

[6] *Heward* v. *Jackson*, 21 Chy. 263.

[7] Deane Con. 337.

[8] *Doe d. Meyers* v. *Marsh*, 9 Q. B. 242.

[9] *Owston* v. *Williams*, 16 Q. B. 405.

[10] *Doe d. Woods* v. *Fox*, 3 Q. B. 134.

of the deed declaring that, nevertheless, the grantee shall have no right to sell, alien or dispose of the property, but that he is to have the use during his life, and his children after his death; this was held to be repugnant and void.[1] Under a conveyance of land to M. to hold during her natural life, then to go to her heirs equally alike, and then to her heirs and assigns forever, M. took a fee under the rule in Shelley's case.[2]

It is difficult to see why, in the printed form of deeds, the *habendum* is retained under the statutory forms. For the ordinary transfer, the use of it is quite unnecessary and unauthorized by the statute; and if the Legislature thought it necessary, it would have been inserted in the form given in the schedule. By R. S. O., cap. 98, sec. 2, all corporeal hereditaments shall, as regards the immediate freehold, be deemed to lie in grant as well as in livery. The effect of this word grant, is not, so far as regards the immediate freehold, strengthened in any way by a *habendum*. Indeed, the use of the latter may give rise to difficulties where the Act respecting short forms is to be construed along with the statute of uses.[3] Of course, if the *habendum* is to limit the estate, its use is obvious.

Whilst reversionary interests in freeholds pass by grant at common law, freehold hereditaments in possession now pass by virtue of this statute in the word grant, and require no further limitations to transmute the possession. The statutory conveyance seems to pass the legal estate in the first instance by virtue of the word grant, just as a conveyance at common law would do. A grant to A., to the use of B., under the statute of uses, gives the legal estate to B., and any subsequent use was a use upon a use or a trust. But a bargain and sale to A. or a grant unto and to the use of A., gave A. the legal estate, and any subsequent use was a trust. Now, does our statute operate as a bargain and sale, or is the word grant efficacious enough to convey the legal estate without the doctrine of a use raised by a con-

[1] *Lario* v. *Walker*, 28 Chy. 216.

[2] *Brown O'Dwyer*, 35 Q. B. 354.

[3] See Judgment of Proudfoot, V.C., in *Seaton* v. *Lunney*, 27 Chy. 174.

sideration presumed and then effected? The writer apprehends that it does not operate as a bargain and sale, because, strictly, in this species of conveyance, the use must be executed in the grantee, and no other limitation could consistently follow.[1] A bargain and sale excludes the idea of a trust; the property can only be held by the bargainee as it was paid for by him. No *habendum* can interfere with his estate to the extent of his purchase money, and that can be limited in the conveying part. The object is to convey the legal and beneficial interest at one stroke.

Our statutory deed, or any deed taking effect under the statute declaring that all incorporeal hereditament shall be deemed to lie in grant as well as in livery, is not reduced to this construction, either by the statute of Uses, or the doctrine of the Court of Chancery regarding uses raised on a consideration. The obvious use of the statute is to convey the legal estate, leaving any trusts to be declared by *habendum* or otherwise. Unless for this purpose, it is not easy to see why the rather inelegant language of the ordinary *habendum* should be used in deeds of ordinary conveyance.

It was certainly not intended by the framers of our Acts to render the word grant so inflexible that it would make a conveyance, made in pursuance of it, incapable of being used as a trust instrument. It is submitted that a statutory grant to A. gives A. the legal estate; and a statutory grant to A., to the use of B., gives B. the legal estate under the statute of uses. (See *ante* Grant and Feoffment.)

X. COVENANTS.

No precise form of words is necessary to constitute a covenant. The words in a contract under seal, "I will be answerable," or "I will be accountable to A. for £10," or "I am content to give A. £10 at Michaelmas," amount to a covenant to pay the money.[2]

[1] See *Gamble* v. *Rees*, 6 U. C. R. 396.

[2] Addison on Contracts, 922.

And recitals in a deed will amount to a covenant, upon which an action of covenant may be maintained, where it appears to be the intention of the parties that they should do so.[1] But a recital does not necessarily imply a covenant, and whether it does so or not, in each case, depends on what is to be collected as the intention of the parties from the whole instrument.[2]

A covenant must be express and distinct, and not gathered as arising consequentially or morally by reason of something else in the deed[3]; and in an agreement under seal, if the vendor agrees to convey to the purchaser land for a fixed sum, payable in a specified manner, it has been held to amount to a covenant to pay the money.[4] But where the proviso of a mortgage had only the words, "in three equal payments to be respectively made," this did not create a covenant to pay the amounts specified[5]; and it appears that an action of covenant cannot be maintained on the proviso in a mortgage deed.[6]

Usual covenants in a conveyance to a purchaser extend only to the acts of a vendor, if he himself is a purchaser for value; if he take by descent, to the acts of himself and his ancestors; and if by devise, to himself and his devisor.[7]

Where the purchaser gives back a mortgage, it would seem that the covenants in the deed and mortgage should be of the same character.[8]

Where the vendor is the legal and equitable owner, he is required to enter into full covenants; and where he has acquired this property from his ancestors, then he covenants for their acts, as well as for his own, in so far as such may be necessary. It extends to his right to convey, which is the first covenant referred to, but the usual covenant

[1] *Lay* v. *Mottram*, 19 C. B. N. S. 479.
[2] *Ivens* v. *Elwes*, 24 L. J., Chy. 249.
[3] *Liddell* v. *Munro*, 4 Q. B. 474.
[4] *Berry* v. *Garrard*, 32 Q. B. 173.
[5] *Jackson* v. *Yeomans*, 19 C. P. 394.
[6] T. T., 3 Vic.
[7] *Gamble* v. *McKay*, 7 C. P. 319.
[8] *McKay* v. *Reed*, 1 Chy. Cha. 208.

otherwise is that no acts of his have affected his right to convey.[1]

1. Title. The benefit of the covenants for title runs with the land, whether freehold or leasehold,[2] and every absolute owner is bound to enter into them on the sale of his property[3]; and it would seem, in England, that a husband is bound to do so on the sale of his wife's real estate, though not when it is held to her separate use.

The covenants for title should always be entered into with the grantee to uses, as otherwise they will not run with the land in case of the power of appointment being exercised.[4]

On a sale of freehold estate, the usual covenants for title are:—The right to convey, for quiet enjoyment, for freedom from encumbrances, and for further assurances; and under these, the purchaser, in case of eviction, may recover the value of the land, and also of houses which he had built thereon subsequently to his purchase.[5]

Our statute distinguishes, by two covenants, encumbrances subsisting on the property, and those created by the vendor, and adds a covenant as to production of title deeds and a general release, which latter seems to be superfluous.

The covenant in statutory conveyances, that the grantor has a right to convey the lands, is not an absolute covenant, as in statutory mortgages.

2. Quiet Possession. The second covenant is the one for quiet possession, the effect of which is, not to protect the purchaser against *all* molestation, but only against all persons claiming, lawfully or equitably, under the vendor —a guarantee that the purchaser may use the property in any way that the vendor might have used it.

[1] Deane on Conveyancing, 338. Note the addition that can be made to this covenant under Direction 4 in Schedule B. of the Act.

[2] *Riddel* v. *Riddel*, 7 Sim. 729; *Campbell* v. *Lewis*, 3 B. & Ald. 392; Deane on Conveyancing, 339.

[3] *Church* v. *Brown*, 15 Ves. 258-263; note Deane Con. 340.

[4] Sugden Ven. & Pur., Chap. XVI., sec. 1, page 578.

[5] *Bunney* v. *Hopkinson*, 27 Beav. 565.

The full covenant for quiet enjoyment and freedom from encumbrances is not controlled by the restrictive words preceding the earlier covenants.[1] A public highway is apparently not an encumbrance within the covenant for quiet enjoyment,[2] but arrears of taxes due at the time of sale—at the date of the conveyance—are within the covenant for quiet enjoyment.[3] Sewerage rate, imposed by by-law, is a personal charge on the owner, and is not a tax on the land, so as to create a right of action under this covenant.[4] Where the rate is not struck at the date of the conveyance—as between the assessment and before the rating—there was held to be no breach of covenant that the property was free from arrears of taxes, as there was no payment in default, the taxes could not be paid until they were ascertained.[5]

An undischarged mortgage, if satisfied by payment, may not afford a ground of action.[6]

A tortious disturbance by a stranger is not a breach of this covenant, unless the covenant is against disturbance by a particular person, when it is sufficient to shew any disturbance by him, whether by lawful title or otherwise.[7] In England, it is said that a claim of dower by the vendor's wife is a breach of this covenant[8]; but it is no breach that the covenantor's wife is alive, and has not barred her dower[9]; and it seems that, if the wife survive her husband, an action on the covenant for further assurance will only lie upon tender and refusal of an effectual conveyance to pass her estate.[10]

[1] *Wallbridge* v. *Everett*, 22 C. P. 28.
[2] *Moore* v. *Boulton*, 10 Q. B. 140.
[3] *Haynes* v. *Smith*, 11 Q. B. 57.
[4] *Moore* v. *Hynes*, 22 Q. B. 107.
[5] *Corbett* v. *Taylor*, 23 Q. B. 454.
[6] *Kennedy* v. *Solomon*, 14 Q. B. 623.
[7] *Nash* v. *Palmer*, 5 M. & S. 374.
[8] Godb. 333; Palm. 340.
[9] *Bower* v. *Brass*, E. T. 5 Vic.
[10] *Hoyt* v. *Widdifield*, 5 Q. B. 180; *Dack* v. *Currie*, 12 Q. B. 334; *Wilson* v. *Biggar*, 26 Q. B. 85.

3. Free from Encumbrances. Then follows the covenant that the property is free from any encumbrances created by the vendor, or through, or in trust for him, or by any of his ancestors, in case the vendor himself acquires the property by descent. It is not a covenant that there are no encumbrances, but that the purchaser will not be disturbed by any encumbrancer.[1]

Where the equity of redemption is sold, subject to a mortgage, the mortgagor, in case he covenanted for payment of the debt, becomes surety of the purchaser for the payment of the mortgage debt; and, if the same is allowed to run into default, he can call upon the party as to whom he stands in the relation of surety, his assignee, to pay the debt.[2]

This covenant, under the Act, does not, in deeds of grant, include all arrears of taxes and assessments, as the corresponding covenant in mortgages.

As to the right of a purchaser under an agreement to pay off existing encumbrances, see *Stammers* v. *O'Donohoe*.[3] In that case Mr. Boyd, the present Chancellor, said:—

"The plaintiff is entitled to have this mortgage paid off or discharged before he need accept a conveyance from the defendant. The money in court may be applied *pro tanto* to satisfy the encumbrance."

The covenant, also, in the statutory forms, that the grantor himself has done no act to encumber, may be referred to in connexion with the present one. It is the covenant given by trustees and others, who do not warrant the title, except as to their own acts.

4. Further Assurance. The vendor covenants for further assurance; and on behalf of his ancestors also, in case he acquires the property by descent. This covenant refers to perfecting the property to the purchaser, doing anything that may be reasonably required for that purpose. The

[1] As to concealing an encumbrance, see *Lovelace* v. *Harrington*, 27 Chy. 178.

[2] *Campbell* v. *Robinson*, 27 Chy. 634.

[3] 29 Grant 64. This case is in appeal.

perfecting of the title is to be at the expense of the purchaser. It seems that, if a wife survive her husband, an action on this covenant will only lie upon tender and refusal of an effectual conveyance to pass her estate.[1]

Under this covenant the purchaser cannot require a covenant for the production of title deeds[2]; but, a purchaser who has delivered up all the deeds to a purchaser of part of the lands, may require the covenantors to execute a duplicate conveyance.[3]

5. Production. A purchaser is not compellable to rely on the equitable right to compel production of the deeds, but may require a valid covenant for their production.[4] The purchaser is either entitled to this or to the deeds themselves[5]; and it is settled in England that a purchaser neglecting to take such covenant has an equity against his vendor (not grounded on the covenant for further assurance,) to enforce production of the deeds, although he cannot, it seems, compel the execution of a deed of covenant to produce.[6] But now, by our Revised Statute, cap. 109, the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to the title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents. The covenant should extend, not only to deeds, but to all the instruments of title not delivered up to the purchaser.[7] A vendor, unless some special ground be laid for it, is never called upon to prove the execution of his title deeds.[8]

If, on a sale of land, the vendor retains the deeds in respect of the unsold portion, and at the same time enters into

[1] *Wilson* v. *Biggar*, 26 Q. B. 85.
[2] *Hallet* v. *Middleton*, 1 Russ. 243.
[3] *Napper* v. *Allington*, 1 Eq. Cas. Ab. 166, D. 4.
[4] Sug. V. & P. C. 11, S. 6, page 452.
[5] *Barclay* v. *Raine*, 1 Sim. & S. 449.
[6] Hayes on Con., and cases therein referred to, pages 164, 165, 166.
[7] As to documents of which the purchaser is not entitled to copies, see Sug. V. & P. Chap. II. See *infra*.
[8] Sug. V. & P. 438.

a covenant for their production to the purchaser, and afterwards sells the remainder of the property, the second purchaser would be entitled to the deeds, but he may be required by the vendor to enter into a covenant with him to perform the covenant for production.[1]

The grantor is relieved of this covenant by fire or other inevitable accident. Production is allowed at any trial or hearing in any action or suit at law or in equity, or other judicature, or otherwise.

6. **Release all Claims.** The clause in the short forms Act to the effect that the vendor releases to the vendee all his claims upon the said lands, cannot be said to be of any special value, and has been declared to be simply useless. It is said to be omitted in England in assurances made in pursuance of powers of appointments.[2]

X. DOWER.

Where a party agrees to convey property, he is bound to do so free from dower; or, if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money.[3] Her right to dower is, during her husband's life, only a nominal encumbrance, still the purchaser is entitled to have it removed, or to have the contract specifically performed, with an abatement in the purchase money.[4]

If there is a regular bar of dower in the deed, and both husband and wife execute it, this is sufficient, though the husband only is a formal party[5]; but where the wife signed a deed containing no bar of dower, that of itself would be insufficient.[6]

[1] Dart on V. & P. 362.
[2] Deane Con. 337.
[3] *Kendrew* v. *Shewan*, 4 Chy. 578.
[4] *Van Norman* v. *Beaupre*, 5 Chy. 599.
[5] *Bonter* v. *Northcote*, 20 C. P. 76.
[6] *Thompson* v. *Thompson*, 2 Chy. Cha. 211.

Where, in a suit for specific performance, the wife refuses to join in the conveyance to bar dower, the proper mode of protecting the purchaser is to set aside a sufficient portion of the purchase money to indemnify him against the claim for dower in the event of the wife subsequently becoming entitled thereto by surviving her husband; the interest, during the joint lives of the vendor and his wife, to be paid to him, and also the principal so set aside on her decease.[1]

In regard to the rather difficult subject of dower, the conveyancer must consider whether the wife is entitled, and how her dower can be barred in case she is so entitled.

As to who are entitled, the following cases will answer most of the questions on the former point. The general rule is, of course, that wherever a husband has an estate in fee his wife is entitled to dower out of it.

The widow of an alien naturalized is entitled to dower,[2] and if her husband has been seized of the land during his lifetime she is also entitled.[3] But the wife of a mortgagee is not entitled[4]; nor where her husband's lands are sold for taxes.[5] The wife of a tenant in common may be endowed,[6] and a wife may be entitled to dower out of lands where the patent never issued and though all the purchase money had not been paid,[7] as being equitably entitled, and it makes no difference whether the parties were married before or after the Act—4 Will. IV.[8]

A sale under an execution against the husband's estate does not bar the wife's dower,[9] but a sale for taxes does.[10]

[1] *Skinner* v. *Ainsworth*, 24 Chy. 148; *Loughead* v. *Stubbs*, 27 Chy. 387.
[2] *White* v. *Laing*, 2 C. P. 186.
[3] *Davenport* v. *Davenport*, 7 C. P. 401.
[4] *Ham* v. *Ham*, 14 Q. B. 497.
[5] *Tomlinson* v. *Hill*, 5 Chy. 231.
[6] *Ham* v. *Ham*, 14 Q. B. 497.
[7] *Craig* v. *Templeton*, 8 Chy. 483.
[8] *McIntosh* v. *Wood*, 15 Chy. 92.
[9] *Walker* v. *Powers*, M. T. 4 Vic.
[10] *Tomlinson* v. *Hill*, 5 Chy. 231.

On the death of one of two joint tenants during their joint seisin, the title passes to the other joint tenant free from the dower of the deceased tenant's widow.[1]

If the husband is seised of an estate in fee, her right to dower attaches—so a purchaser's wife, though he gave a mortgage back to secure a portion of the purchase money.[2]

Dower may be previously released, or the wife may be disentitled, so that her joining the deed may be unnecessary.

Where a right of dower is released by an instrument separate from the conveyance by the husband, an examination and certificate are still necessary,[3] though, where a Vesting Order was used by the purchaser, a separate deed by the wife was sufficient without such formalities.[4]

1. Marriage Settlement. Where a marriage settlement intends to convey certain property to a wife so as to bar her dower in her husband's lands, it must appear that such settlement was to be in lieu of dower[5]; and where the parties were from Lower Canada, it has been held, that unless mention were made in the settlement or marriage contract of the lands in this Province owned by the husband, it would not operate as a bar to these.[6]

2. Election. Under a will expressly declaring that what is given to the widow is intended to be in lieu of dower, the widow is bound by her election, both in law and equity[7]; and where she elects to take an annuity in lieu of dower, she is not entitled to dower out of any of the testator's lands, whether devised or not.[8] In an exchange, she must elect to take from one or the other of the lands given and taken—she cannot get dower out of both.[9]

[1] *Haskill* v. *Fraser*, 12 C. P. 383.
[2] *Lynch* v. *O'Hara*, 6 C. P. 259.
[3] *Bogart* v. *Paterson*, 14 Chy. 624.
[4] *Heward* v. *Scott*, 2 Chy. Cha. 274.
[5] *Gilkison* v. *Elliott*, 27 Q. B. 95.
[6] *Jamieson* v. *Fisher*, 2 E. & A. 242; 12 C. P. 601.
[7] *Walton* v. *Hill*, 8 Q. B. 562.
[8] *Davidson* v. *Boomer*, 18 Chy. 475.
[9] *McLellan* v. *Meggat*, 7 Q. B. 554; *White* v. *Laing*, 2 C. P. 186.

Dower may be barred by accepting devises or bequests, and electing to take them in lieu of dower,[1] and she will be called to elect in lands given and taken in exchange, to take one or the other.[2]

3. **Adultery.** If a wife voluntarily lives apart from her husband, in adultery, she is deprived of dower[3]; but a wife abandoned by her husband, and subsequently guilty of adultery, is not barred from dower.[4]

4. **Alimony.** Unless a wife is disentitled to alimony, no order will be made to convey free from dower,[5] or where she has left her husband, and has expressed her determination never to return to reside with him.[6]

Where the wife lives apart from her husband for over two years, under such circumstances as would disentitle her to alimony, a judge of a High Court may, if the husband desire to sell[7] or mortgage[8] the place, make an order which will bar her dower; and where the wife is a lunatic, the judge can also make an order equivalent to bind her as if she could duly execute a bar of dower. See chap. on Mortgages, Dower.

5. **Wild Lands.** Dower is not recoverable out of any separate or distinct piece of land, which at the time of alienation by the husband, or at the time of his death, if he died seized thereof, was in a state of nature, and unimproved by clearing, fencing, or otherwise, for the purposes of cultivation or occupation. R. S. O., cap. 126, sec. 8; and see R. S. O., cap. 55, sec. 35.

XI. SUBSEQUENT MATTERS.

After a conveyance of land has been drawn and executed by the parties, affidavits necessary for registration sworn

[1] *Walton* v. *Hill*, 8 Q. B. 562.
[2] *White* v. *Laing*, 2 C. P. 186.
[3] *Neff* v. *Thompson*, 20 C. P. 211; *Worsley* v. *Finch*, 20 C. P. 132.
[4] *Graham* v. *Law*, 6 C. P. 310.
[5] *Re Eagles*, 7 P. R. 241.
[6] *Re Campbell*, 25 Chy. 187.
[7] R. S. O., cap. 126; 44 Vic., Ont. cap. 14.
Ont. Stat., 44 Vic., cap. 14.

to, and the deeds registered, there may yet remain some points to which attention may be directed. There is the question of the purchase money and interest thereon, if no mortgage be taken back, and the lien of the vendor for unpaid purchase money; the taking possession of the property sold; the custody of the title deeds and the cost of the transfer.

2. Vendor's Lien. The general rule of law as to a vendor's lien is laid down in the leading case of *Mackreth* v. *Symons*[1] as follows:—

1. A vendor's lien for unpaid purchase money, unless relinquished, exists against all persons except purchasers for valuable consideration without notice, having the legal estate.

2. Another security taken and relied on may, according to its nature, and the circumstances under which it is taken, be evidence of relinquishment, but the proof is on the purchaser.

In our own Courts it has been decided, that, taking a mortgage for part of the purchase money, destroys the lien as to the balance of it,[2] and also for the remainder unsecured[3]; but taking notes from the vendee, and his surety is no waiver[4]—not even where a bond is given with a third person as surety.[5] It would appear that where notes only are given the lien is not lost, unless by express agreement that there is to be none[6]; and the lien is not lost by the amount being turned into a judgment.[7] But now by statute in all deeds executed since the 18th of September, 1865, there is no lien on the land for unpaid purchase money; and no equitable lien, charge or interest shall be deemed valid in any court in this Province as

[1] 15 Ves. 329.
[2] *Driffil* v. *McFall*, 41 Q. B. 313.
[3] *Anderson* v. *Trott*, 19 Chy. 619.
[4] *Mitchell* v. *McGaffey*, 6 Chy. 361.
[5] *Sherman* v. *Parsill*, 18 Chy. 8.
[6] *McDonald* v. *McDonald*, 16 Chy. 678.
[7] *Flint* v. *Smith*, 8 Chy. 339.

against a registered instrument executed by the same party, his heirs or assigns.[1]

2. Interest, Costs, etc. Interest on the purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession; and a difficulty respecting his conveyance may justify his not taking possession.[2] If the purchaser takes possession before conveyance, he is liable to interest from the time of taking possession.[3] And the purchaser is entitled to all the rents and profits arising from the estate purchased, which accrue due subsequent to the time when he becomes such purchaser.[4]

A purchaser, by taking a conveyance or vesting order, waives all objections to the title, and also takes upon himself the responsibility of obtaining possession; and, if evicted by a title to which his covenants do not extend, he has no right to compensation on that account.[5]

All deeds relating exclusively to the property sold must be delivered up to the purchaser[6]; but, when the property is sold in lots, the purchaser for the most value is entitled to their custody, but he must covenant with the other owners for their production.[7] Except such deeds as are not of record, the vendor must supply attested copies at his own expense[8]; but the vendor may limit his liability in these matters, by setting it out in the agreement or conditions of sale.[9] Where a vendor takes a mortgage back, he is, of course, entitled to retain all the title deeds.

In the absence of stipulation, a vendor is bound to produce, at his own expense, the originals of all deeds and

[1] See Registry Act, R. S. O., cap. 111, sec. 81.

[2] *Rae* v. *Geddes*, 3 Chy. Cha. 404.

[3] *Great Western Railway Co.* v. *Jones*, 13 Chy. 355.

[4] *Brady* v. *Keenan*, 6 P. R. 262.

[5] *Bull* v. *Harper*, 7 P. R. 36.

[6] *Parr* v. *Lovegrove*, 4 Drew, 182.

[7] Prideaux Con. 204.

[8] Dart, 676.

[9] *Broughton* v. *Jewel*, 15 Ves. 176.

other instruments necessary to verify the abstract,[1] except copies of such instruments as are upon record,[2] or have been lost or destroyed[3]; and, as a general rule, the vendor pays for the abstract.[4] He must also pay the expense of comparing the abstract with the deeds should the title prove bad—if this is done before the title is investigated[5]; but this practice is not recommended.[6] Unnecessary searches are not allowed, even as between solicitor and client.[7]

Where there is no agreement to the contrary, the purchaser prepares the conveyance at his own expense, and tenders it for execution to the vendor,[8] who must procure its execution by all parties, and incur whatever expense that may entail.[9]

After a contract for sale is entered into, the estate in equity vested in the purchaser, but a formal conveyance, is necessary to get in the legal estate.

The purchaser is thus called upon to pay for his own security, under the general rule to that effect. It may be thought from this that a vendor who has his purchase money secured by a mortgage, should pay for his own security; but a little reflection will shew that the mortgage was taken to suit the convenience of the purchaser, and that he should pay for this advantage.

[1] *Berry* v. *Young*, 2 Esp. 640.
[2] *Cooper* v. *Emery*, 1 Ph. 388.
[3] *Harvey* v. *Phillips*, 2 Atk. 541.
[4] Sug. 406, Dart, 280.
[5] See Dart, 306.
[6] Dart, 500.
[7] *Langford* v. *Mahoney*, 3 J. & L. 97.
[8] Dart, 500.
[9] See *Weiss* v. *Crafts*, 6 P. R. 151.

NOTE.—In connection with the Forms and Precedents for this chapter *post*, will be added a reference to particular grants, or grants under certain statutes, such as Religious Institutions, Mechanics' Institutes, the Statutes of Mortmain, etc., and the Rules and Regulations of the Free Grants of Ontario.

CHAPTER V.

LEASES.

I. PRELIMINARY.

II. LESSOR'S TITLE.

III. LEASES—HOW MADE:

1. *Agreements for Leases.*
2. *Void Leases as Agreements.*

IV. PAROL LEASES:

1. *Lessor's Obligations and Rights.*
2. *Lessee's Obligations and Rights.*

V. LEASES BY DEED:

1. *Short Forms.*
2. *Habendum.*
3. *Reddendum.*
4. *Covenants.*
   (*a*) *Pay rents and taxes.*
   (*b*) *Repair.*
   (*c*) *Keep up fences. Not cut down timber.*
   (*d*) *Not assign, nor sublet.*
   (*e*) *Quiet enjoyment.*
5. *Proviso for re-entry.*

VI. DETERMINATION OF TENANCY:

1. *Forfeiture.*
2. *Effluxion of time.*
3. *Notice.*
4. *Surrender.*

VII. DISTRESS.

I. PRELIMINARY.

It must be remembered, in the preparation of a lease, that a continuing limited relationship is to be provided for between the parties, and that the lessor and lessee are bound up, to some extent, in each other, for a determined period. It is a sort of partnership of two, in which one finds or contributes the capital, and the other works it. But the dormant partner, in this case, runs little risk with his tenant, and none at all with third persons.

In other transactions, as in sales or purchases, the parties are disconnected after the sale is over. A lease, it is true, is a sale of the interest in real or personal property, but only for a determined period; it is a loan of capital, invested

in land, houses or other transferable property of that nature, and after the period has elapsed, its use revests in the owner, and the parties are disconnected again. The purchase money for the sale, instead of being paid at once, is usually paid at stated periods, and when the last payment is made, the lessor gets back his property, nearly in the same condition as when he leased it.

These two circumstances, of the periodical payments, and the state of the property when the owner receives it back again, form the two main features and difficulties of a lease; because, if the owner gets paid for the use of the property, and gets it back intact, he has got all that he can expect. To provide for these two things are the main objects in drawing a lease.

There is, probably, no department in our law so well defined, and so capable of a clear and satisfactory elucidation or opinion, as the relation of landlord and tenant—the relation which a lease creates. Nevertheless, though the ground upon which it stands is clearly marked out by the common and statute law, that ground itself is by no means insignificant in proportions, nor to be comprehended within a cursory glance. The portion of it indispensable to one about to prepare a lease, will be referred to, within such limits as are at the writer's disposal.

II. THE LESSOR'S TITLE.

In this Province, leases have not the importance they have in England, where the farming portion of the community are generally the lessees from large land-owners. Nevertheless, the thorough investigation of the title to the property about to be leased, is as important for the tenant, comparatively, as if he were purchasing it out and out. He buys it out and out only for a determined period it is true, but that period is all-important for him. It is with reference to that period that he retains a professional man to see that he is protected.

Under an open agreement to grant or assign a lease, the intended lessor or vendor is bound to produce and verify

the title,[1] unless there is a condition in the agreement that the vendor shall not be bound to produce his title. Where there was a condition that the lessor's title would not be shewn and should not be enquired into, the purchaser was precluded from raising any objection to the title, though the lessors had no power of leasing the property.[2] A purchaser of leaseholds should require the production of the last receipt for the rent, and should be careful to ascertain that all the covenants in the lease have been performed up to the date of the purchase. He should also examine the lease, for the purpose of ascertaining that it is not an underlease, and that there is no other property comprised in the lease to which the covenants and provisos extend.[3] An assignee of a leasehold interest is not liable for the breach of any of the covenants contained in the lease occurring after he has executed an assignment of the lease to another person; so that if the vendor of a leasehold interest is not the original lessee, but an assignee or the representative of an assignee, he is not entitled to a covenant from the purchaser for the payment of the future rent and the future observance of the covenants, unless he, the vendor, is under the obligation of a covenant for the payment and observance of such rent and covenants.[4] In the absence of any express covenant, the original lessee has a legal right to be indemnified by the holder of the lease, for the time being, against breaches of covenant committed during his tenancy, whether such holder takes by assignment directly from the lessee or after mesne assignments.[5]

The next thing to be considered, after the title is traced down to the lessor, is to see whether or not the property be in mortgage. If so, the lessor has not the legal estate, and in the absence of an express power or stipulation to that effect in the mortgage, cannot grant a lease binding on the mortgagee though it may be binding on himself. The consent

[1] *Stranks* v. *St. John*, L. R. 2 C. P. 376 Sug. V. & P. 307.
[2] *Hume* v. *Bentley*, 5 De G. & Sm. 520.
[3] Prideaux Con. 144.
[4] *Moule* v. *Garrett*, L. R. 7 Ex. 101.
[5] Prideaux Con. 236.

of the mortgagee must be obtained, and the person to whom the rent is to be paid clearly specified. The lessee will be protected in paying the rent to the mortgagor, if he lease from him, until he receives notice from the mortgagee to pay it to him.[1] And neither can a mortgagee, properly speaking, grant a lease, unless he has power to do so under the mortgage deed, and then it ought to be granted strictly within the power. It is said, that if the lease granted by a mortgagee (without the consent of the mortgagor, of course,) be a beneficial one to the estate, and for an ordinary term, and such as a prudent man would grant if the property were his own, it would probably be supported in equity[2]; but the fact must not be lost sight of, that the mortgagor is entitled to have his estate restored to him, on payment of the principal, interest and costs due his mortgagee, and should not be bound by any lease to which he was not a consenting party.

Where the lessor himself holds under a lease, he may be able to grant an underlease, unless the power of making such underlease is expressly withheld from him. (See *post.*)

III. LEASES—HOW MADE.

A lease may be made by implication of law, by parol, by writing, or by deed. As to the first of these, an ordinary case is that of a tenancy at will, where the tenant remains in possession and pays rent, and his estate, by implication of law, becomes a tenancy from year to year. A lease capable of being made by parol, and a lease in writing not by deed are much on the same footing: where the law requires a writing, the lease must be by deed, and where the law does not, a writing is of no more efficacy than a verbal agreement, except that a written document is more useful as evidence in case of dispute.

Before the Statute of Frauds, any lease or agreement for a lease of land might be by word of mouth. Since the

[1] *Wilton* v. *Dunn*, 15 Jur. 1104.

[2] Greenwood Con. 64.

passing of that statute, only leases for three years or less, from the making thereof, and whereupon the rent reserved during the term amounts to two-thirds at least the full improved value of the thing demised, are good without a writing—without being made by deed. The two simple conditions in determining if a written lease be necessary, are :

1st. Is the term to be three years or less from the making ?

2nd. Is the rent, at least, two-thirds of the improved value of the thing demised ?

The difficulty of proving satisfactorily the latter condition will make it advisable, in all cases, to have a written lease drawn, and it will be seen, presently, what advantages a written lease has over a parol one. For the lessor, in a parol lease, is not liable on any covenant, except that the lessee will have quiet enjoyment of the property demised [1]; as it is doubtful if he impliedly promises that he has a good title to let. If the lessee wants any other covenant, it must be reduced into writing. Again, if, by any oversight or intention, the lease by word of mouth was not to take effect at once, but reserved to begin at a future day, it is void altogether. Neither party can enforce possession by action or suit, and no action for rent will lie where no possession was given—no tenancy created. These and other kindred matters will be referred to presently.[2]

1. Agreements for Leases. The next observation is in regard to agreements for leases.

An agreement for a lease is recognized by the Statute of Frauds, but every such agreement, no matter what the term or the rent may be, must be in writing and signed by the

[1] *Hull* v. *City of London Brewery Co.*, 31 L. J. Q. B. 257.

[2] There is some conflict of authority as to whether or not in a parol lease the lessor covenants for anything beyond quiet enjoyment to the lessee. The case of *Stranks* v. *St. John*, L. R. 2 C. P. 376, is cited by Mr. Hayes (Conveyancing, page 644), as authority that the lessor impliedly promises he has a good title to let. Mr. Addison, Contracts 21, cites *Bandy* v. *Cartwright*, 8 Ex. 913, and other cases to show there is no such implied covenant. In Ball's Principles of Contracts (London, 1881), the latter view is adopted. See *infra*, parol leases.

party to be charged, or by his agent, authorized in writing also. It is a curious anomaly in the law of leases, that an agreement for a lease for, say, two years, and at the full rental of the property demised, must be in writing, but the lease itself need not be so—that the perfect security has less formality about it than the agreement which it merges.

As a matter of practice, however, it rarely happens that any one draws up an agreement for a lease. The lease itself is easier to draw up. Two suggestions in drawing up an agreement for a lease are given[1]—one, that the lessee is not to require investigation of his lessor's title; and, secondly, that the instrument is intended only as an agreement, and does not pass any legal interest to the lessee. A third may also be added in regard to the proportion of the costs to be borne by the parties.

Unless the agreement contains all the covenants, it will give rise to difficulty; and if it declare that the lease is to contain the "usual" or proper covenants, there will be another difficulty, in limiting the meaning of these words. Usual covenants may be taken to include to pay rent, to pay taxes, to repair, and to allow lessor to enter and view the state of repair on the part of the lessee; and, on the part of the lessor, that the lessee shall have quiet enjoyment of the premises. But, if the lessor wishes to prohibit his lessee from assigning or subletting without his license, then he must not depend on that being a usual covenant.[2] Likewise, one not to carry on a particular trade or business,[3] must be put in the agreement, if it is to be in the lease. The precise meaning of what is a usual covenant would be governed largely by the custom of the place—the uses to which the property would be put, etc., and should not be left open to discussion or litigation.[4]

It may be difficult, at times, to determine whether a particular instrument is a lease or an agree-

[1] Deane Con. 346.
[2] *Church* v. *Brown*, 15 Vesey, 259.
[3] *Propert* v. *Parker*, 2 My. & K. 280.
[4] Deane Con. 348.

ment. The words "agrees to let or hire" are words of present demise, unless the contrary appear[1]; and an agreement in writing, whereby A. agreed to rent to B., for three years from date, for £50 per annum, with taxes, payable quarterly, B. to spend £25 in improvements, was held to be a lease and not an agreement.[2] As has been remarked, an agreement for a lease must be in writing, and signed, to be sued on as such; but he who enters and pays, or agrees to pay, rent, under an oral agreement for a lease, or otherwise partly performs the agreement, may obtain a decree for a lease.[3] A person so entering and paying rent, becomes a tenant from year to year, upon such terms of the agreement as are consistent with a yearly tenancy.[4]

2. Void Leases as Agreements. These are very frequently regarded as agreements for leases, and arise from the construction which the Courts have put on certain instruments, void, in strictness, as leases, but which however were intended to operate as such. The test of a lease is, Does it contain words of present demise? Even if not, but if it contains, with certainty, all the terms of the lease, and has been acted upon, the Court is inclined to hold it to be a lease and not an agreement. In one unreported case, in our own Courts, it was doubted if the statute was to be considered as influencing the question at all, where the parties acted on the terms of the agreement.

Every lease now required to be in writing, must be by deed, and so, if sealing were omitted, the lease would be ineffectual under the statute; but it has been held that there is nothing in the Act to prevent an instrument, which is void as a lease at law for want of a seal, from operating in equity as an agreement for a lease.[5] And where a tenant enters into possession under a void lease, he may first become tenant at will, and afterwards, if he pays rent, there is a

[1] *Cumming* v. *Hill*, 6 O. S. 303.
[2] *Grant* v. *Lynch*, 6 C. P. 178.
[3] *Nunn* v. *Fabian*, L. R. 1 Chy. 35.
[4] *Martin* v. *Smith*, L. R. 9 Ex. 203.
[5] *Parker* v. *Taswell*, 2 De G. & J. 559.

tenancy from year to year, and all the covenants in the lease will apply to the yearly tenancy.[1]

A tenancy at will is where a man lets land to another, and either party may put an end to the tenancy at pleasure.[2]

Where there is no clause in a mortgage that the mortgagor is to have quiet possession until default, he is tenant at will to the mortgagee, and any tenancy created by the mortgagor, without the concurrence of his mortgagee, is a tenancy at will. A tenancy at will may be determined at any time by the tenant delivering up possession, or the landlord demanding it, and no notice to quit is necessary.

The case of *Richardson* v. *Langridge*[3] is the leading case in determining whether a tenancy be at will or from year to year. In that case it was decided that an agreement to let premises so long as both parties live, reserving a compensation accruing *de die in diem*, and not referred to a year or any aliquot part of a year, does not create a holding from year to year, but a tenancy at will, strictly so called; but if there is a general letting at a yearly rent, though payable half yearly or quarterly, and though nothing is said about the duration of the term, it is an implied letting from year to year.

The leaning of the Court is to construe a tenancy as one from year to year, rather than a tenancy at will.

Where a person enters into possession of land under an agreement to purchase, he is tenant at will to the seller;[4] and, in case of an agreement to pay by instalments, with a stipulation for forfeiture if payment be not made on a particular day, if payment be received on account after the day, it is also a tenancy at will.[5]

A tenancy from year to year may arise, as has been mentioned, or may be created, by an express agreement. If

[1] *Richardson* v. *Gifford*, 1 A. & E. 52; *Beale* v. *Sanders*, 3 Bing. N. C. 850.

[2] Prideaux Con. 3.

[3] 4 Taunton, 128.

[4] *Doe d. Kemp* v. *Garner*, 1 U. C. Q. B. 39.

[5] *Lundy* v. *Dovey*, 7 C. P. 38.

one lets land to another at an annual rent without more, as to the length or term of the tenancy, it creates a tenancy from year to year. An overholding tenant, or tenant at sufferance, may, like a tenant at will, become a tenant from year to year, if he pays rent to his landlord, or rather if the latter receives rent from him, with the same covenants and conditions as are applicable to that species of estate.[1] And where a person takes possession and pays rent under an agreement for a future lease,[2] or under an invalid demise, as in the case of a corporation without their seal,[3] it becomes a tenancy from year to year.

Six calendar months' notice is required to determine this tenancy, and the notice is to end at the period of the year at which the tenancy commenced, and the tenant's executors or administrators are entitled to the same notice that he is.[4]

Of course, any tenancy may be determined under the terms in the lease for that purpose, or by forfeiture under breaches of covenant, or by a surrender. (See Determination of a Tenancy.)

IV. PAROL LEASES.

Mr. Hayes, in his Concise Conveyancer,[5] has referred to the essential points in every good lease. These may be epitomized to suit our law as follows:

1. Parties capable of being lessor and lessee.[6]

2. A thing demised which is demisable.

3. When a deed is necessary, all necessary circumstances, as sealing, delivery, etc., must be observed; and, in all cases, the essential ingredients of the lease must be either expressed in the deed, or capable of proof by oral evidence.

[1] *Hyatt* v. *Griffith*, 17 Q. B. 505.

[2] *Doe d. Thompson* v. *Ainey*, 12 A. & E. 476.

[3] *Wood* v. *Tate*, 2 Bos. & Pul. N. S. 247.

[4] *Doe d. Shore* v. *Porter*, 3 T. R. 13.

[5] Page 643.

[6] A lease to an infant is not void, but only voidable on his coming of age. *Baylis* v. *Dyneley*, 3 M. & S. 477.

4. If it be a lease for years, it must have a commencement and ending, certain, or capable of being reduced to certainty.

5. An acceptance of the thing demised by the lessee, and attornment, where such is necessary.

A parol lease must not begin *in futuro*. The relation created by a parol lease is not always easy to define. It may be that, as to implied contracts of the parties, there is a difference between an oral lease and what may be called a parol lease reduced into writing.

Several authorities may be cited to shew that the landlord impliedly contracts with the tenant to give him possession, and guarantees him against eviction by any person having a paramount title, and against a disturbance which would be occasioned by some person enforcing a charge which the landlord ought to have satisfied.[1] Our Court of Appeal has, however, decided that, in a parol lease, the lessor is not bound to give possession.[2] There is authority for saying that the lessor impliedly promises to produce a good title,[3] and it is frequently said that the only covenant the lessor gives is for quiet possession. It is not impossible that these cases may be reconciled, but that is for a writer on the subject of landlord and tenant.

The weight of authority will, probably, be in favour of the view taken herein.

The following points refer to cases where the relation exists, but is not qualified in any way by covenants or stipulations, and will be useful to the draftsman, who can see the effect of not providing for the contingencies referred to:—

1. Lessor's Obligations and Rights. In a parol case, or in an open agreement for a lease,

[1] *Coe* v. *Clay*, 5 Bing. 440; *Bandy* v. *Cartwright*, 8 Ex. 913, and see Woodfall, L. & T. 643.

[2] *Moore* v. *Kay*, 5 Ont. App. 261.

[3] *Stranks* v. *St. John*, L. R. 2 C. P. 376.

The lessor is bound—

(*a*) To produce a good title.[1]

(*b*) To give possession[2]; but this does not apply to parol leases.[3]

(*c*) To keep the tenant in quiet possession of the premises.[4]

(*d*) To pay the taxes (except personal rates).[5]

(*e*) In the case of a furnished house, that it is not untenantable by reason of vermin.[6]

The lessor is not bound—

(*a*) To repair.[7]

(*b*) To repair under an express agreement for that purpose, without notice of want of repair.[8]

(*c*) To give notice to quit at the end of the term,[9] unless he wishes to claim double value.[10]

(*d*) To give a written notice to put an end to a term created by a parol.[11]

The lessor has the right—

(*a*) To distrain for the rent, and to follow the tenant's goods for this purpose; and he has priority over any chattel or other mortgagee or judgment creditor, for this purpose, and every other claim, except the claim for taxes.

(*b*) To sue for the breach of covenants for payment of rent, or the performance of any other duties.

(*c*) To bring an action of ejectment where the lease is

[1] *Stranks* v. *St. John*, L. R. 2 C. P. 376.
[2] *Coe* v. *Clay*, 3 Moo. & P. 59, and cases in Addison on Contracts, 306.
[3] *Moore* v. *Kay*, 5 Ont. App. R. 261.
[4] Noke's case, 4 Co. R. 80 b, and see cases in Prideaux Con. page 11.
[5] *Dove* v. *Dove*, 18 C. P. 424.
[6] *Smith* v. *Marrable*, 11 M. & W. 5.
[7] *Gott* v. *Gandy*, 2 E. & B. 845.
[8] *Makin* v. *Wilkinson*, L. R. 6 Ex. 25.
[9] *Cobb* v. *Stokes*, 8 East, 358.
[10] 4 Geo. II., cap. 28.
[11] *Timmins* v. *Rowlinson*, Burr, 1603.

determined by forfeiture, effluxion of time, or notice to quit, and the lessee refuses to give up the premises.

(*d*) To recover double the yearly value of the premises, if the lessee wrongfully and wilfully retains possession after the determination of the term, where a notice in writing and a proper demand of possession are given.[1]

(*e*) To recover double rent where the tenant gives notice of giving up possession at a specified time and does not do so.[2]

(*f*) The waiver[3] of any one covenant or condition in a lease, or the license[4] to do an act which, without a license, would create a forfeiture or give a right to re-enter, extends only to the particular waiver or license, and is not to be construed as a general waiver, or as applying beyond the permission actually given.

(*g*) A license may be given to one of several lessees or co-owners regarding assigning, underletting or otherwise; or to a lessee, to assign or sub-let part of the property, without such license operating to destroy or extinguish the right of re-entry for the breach.[5]

2. **Lessee's Obligations and Rights.** In the absence of provision to the contrary,

The lessee is bound—

(*a*) To accept possession, pay the rent, or see that it is paid, no matter who occupies the premises, or whether they are burnt down or not.[6] If nothing is said as to the amount payable, it is presumed to be equivalent to the annual value of the premises occupied.[7]

(*b*) To keep the premises wind and water-tight.[8]

[1] 4 Geo. II., cap. 28.
[2] 11 Geo. II., cap. 19.
[3] R. S. O., cap. 136, sec. 9.
[4] *Ibid.*, sec. 11.
[5] *Ibid.*, sec. 10.
[6] *Holtzappfel* v. *Baker*, 18 Ves. 115.
[7] Deane Con. 48.
[8] *Auworth* v. *Johnson*, 5 C. & P. 239.

(*c*) To cultivate the premises in a husband-like manner.[1]

(*d*) To leave at the end of the term without notice.

(*e*) To leave when he gives notice, or pay double rent.[2]

(*f*) To leave when he gets notice at the end of the term, or by forfeiture, or pay double value.[3]

(*g*) To commit no waste, such as to pull down houses, cut timber, open mines, dig for minerals, or alter the nature of the land demised[4]; and it seems he is liable for permissive waste.[5]

(*h*) To keep the boundaries distinct between himself and his lessor, if their lands adjoin.[6]

(*i*) Not to remove fixtures, except trade fixtures.[7]

The lessee is not bound—

(*a*) To do substantial repairs.[8]

(*b*) To give notice to leave at the end of the term.[9]

(*c*) To take possession, or be answerable in damages for not taking possession, in a lease by parol.[10]

The lessee is entitled—

(*a*) To be put in possession, or tendered and offered and afforded the power and opportunity of taking possession; otherwise he is not liable upon any express or implied covenants in the lease.[11]

(*b*) To quiet enjoyment of the premises for the term.

(*c*) To emblements.

[1] *Powley* v. *Walker*, 5 T. R. 373.
[2] 11 Geo. II. cap. 19.
[3] 4 Geo. II. cap. 28.
[4] 1 Ins., sec. 67. See *Lancey* v. *Johnson*, 29 Gr. 67, as to boring for oil.
[5] *Harnett* v. *Maitland*, 16 M. & W. 257.
[6] *Att'y-Genl.* v. *Fullerton*, 2 Ves. & B. 263.
[7] *Hughes* v. *Towers*, 16 C. P. 687.
[8] Deane Con. 54.
[9] *Cobb* v. *Stokes*, 8 East, 358.
[10] *Moore* v. *Kay*, 5 Ont. App. R. 261; *Edge* v. *Stafford*, 5 E. & B. 395.
[11] *Holtgate* v. *Kay*, 1 C. & Kirw, 341.

(*d*) To assign or sublet the term or part of it, even if the word "assigns" is not in his lease.[1]

(*e*) To cut underwood—to cut wood for fuel and for repairs.[2]

(*f*) To have the rent accrue from day to day, and be apportioned in respect of time, where the tenancy is determined by re-entry, death, or otherwise, of the lessor, before the next pay day.[3]

(*g*) To six months' notice to quit, ending with the anniversary of the day he took possession, where the tenancy is from year to year.

(*h*) To a week's notice to quit and a month's notice to quit, respectively ending with the week or the month, as the case may be, in weekly or monthly tenancies respectively.[4]

V. LEASES BY DEED. STATUTORY LEASES.

Revised Statute, cap. 103, provides short forms of leases. The Act is very like the Acts respecting short forms of conveyances, and it seems it is applicable only to terms of years, and not to freeholds.[5] The form of lease contains a *habendum* clause, which the forms given for conveyances and mortgages have not, and supplies also a *reddendum* clause. These could not be well omitted in a lease, but the absence of the former clause in deeds of grant and mortgages, is remarkable, and has been referred to before.

Any form of lease in use by conveyancers, if made pursuant to the Act, gets the benefit of expanding its covenants; and, in this respect, the observations applied to instruments under the other short forms Acts apply to leases.[6]

[1] *Church* v. *Brown*, 15 Ves. 258.

[2] *Harnett* v. *Maitland*, 16 M. & W. 257.

[3] R. S. O. cap. 136, secs. 2-3.

[4] R. S. O. cap. 136, sec. 15.

[5] *Turley* v. *Benedict*, 31 C. P. 420; and see wording of the Act.

[6] The Short Forms Act uses the words, "demise and lease . . . all that messuage or tenement situate, lying, and being, etc." It may be worthy of note that, what is included under this, unless an exception be made therein, is somewhat different from the enumeration in the corresponding Acts for conveyances and mortgages.

2. The Habendum. The *habendum* states the day on which the term is to begin and the duration of the term itself. The day may be a past or a future one, as well as the day of the making of the lease. If no time is mentioned for the commencement of the lease, or if the date is an impossible date, the term will be deemed to begin from the day of the delivery of the deed, or the making of the demise, if extrinsic circumstances do not rebut such a presumption.[1]

As to the duration of the lease, it must be capable of being reduced to certainty; though, if the full extent and duration of it are uncertain, the lease will be held good for a specific portion of time, certain within it, and void as to the residue.[2] If no time at all is mentioned for the duration of the term, and there has been no entry upon the land nor payment of rent, there is no lease at all.[3] Where a lease was granted for seven, fourteen, or twenty-one years, after the lessee entered and took possession, he had his option to take that term which was most beneficial to himself, and at the end of seven years, could continue on for fourteen, and so on for the full term—the Courts construing the lease favourably to him.[4]

3. The Reddendum. The *reddendum* states the amount of the rent and the time or times of payment. If let at a yearly rent, in the absence of stipulation, the lessor is entitled to payment only at the end of each year.[5] The last payment should be made in advance to secure the remedies by distress, and the preceding payments should be plainly set out. It is recommended not to state to whom the rent is to be paid, as the law will carry it to the owner of the reversion,[6] and do it more certainly. The Courts will rectify an error in regard to an incomplete or mistaken reservation. Our statute as to apportionment of rent is

[1] *Styles* v. *Wardle*, 4 B. & C. 908.

[2] *Gwynne* v. *Manistone*, 3 C. & P. 302.

[3] Add. Con. 302.

[4] *Dann* v. *Spurrier*, 3 B. & P. 404; and see cases in Addison on Contracts, 300-301.

[5] *Coomber* v. *Howard*, 1 C. B. 440.

[6] 2 Platt on Leases, 18.

referred to elsewhere in this chapter, and it applies, it will be remembered, to cases of determination of the tenancy by re-entry, death, or otherwise.

Under the English Statute, 4-5 Wm. IV., cap. 22, a lessor who put an end to the lease by his own act had no right of apportionment,[1] and Mr. Deane thinks the Act 33-34 Vic., cap. 35, would seem to make no difference in this respect.[2] In *Oldershaw* v. *Holt*, referred to, the Court held that the statute only applied to cases of apportionment between the individual who was entitled to it when it began to accrue, and another who has come in as a remainder-man, or reversioner, or otherwise.

4. Covenants. Any lease made in pursuance of the Act will get the benefit of it, so as to enlarge the meaning of the covenants, and apply them to the parties intended to be covered by the Act. Where the lessor has himself the freehold, the covenants and proviso apply and extend to his heirs and assigns: where he has but a leasehold interest, they apply to his executors, administrators, and assigns. His own covenant for quiet enjoyment extends to his heirs, executors, administrators, and assigns.

The covenants to pay rent,[3] to pay taxes, to repair, to keep up fences, and not to cut down timber, extend, apparently, to the lessee, his heirs, executors, administrators, and assigns; the proviso for re-entry—and the covenant for quiet enjoyment, and to repair according to notice, to the lessee, his executors, administrators, and assigns. The covenant that the lessee will leave the premises in good repair, apparently extends to the lessee only.

To Pay Rent. This covenant, as has been said, binds the lessee, his executors, administrators, and assigns, (and,

[1] See *Oldershaw* v. *Holt*, 12 A. & E. 590-596.

[2] Conveyancing, 356.

[3] It may be doubted if this covenant extends to the heirs of the lessee. See the peculiar wording of column two, in Schedule B. cap. 103: "And the said lessee doth hereby, *for himself, his heirs, executors, administrators, and assigns*, covenant with the said lessor that *he, the said lessee, his executors, administrators, and assigns*, will, during the said term, pay unto the said lessor the rent hereby reserved in manner hereinbefore mentioned, without any deduction whatsoever."

probably his heirs,) to pay the rent without any deduction whatsoever, in the manner set out in the *reddendum* clause, for the term of the lease. It is easy to see that a difficulty could arise, and this covenant be useless, if the rent be not mentioned previously in a definite manner. The lessor would be driven to his action for use and occupation.

The lessee is not liable where the relation of landlord and tenant is continued by an assignee after the term is ended.

The lessee is always under an implied covenant to pay rent to the reversioner, and this is what was meant by saying that rent is incident to the reversion.[1] The rent is almost always, in practice, agreed upon by the parties, but, if not, the amount payable would be the annual value of the premises occupied. This is usually a sum of money, but it may be labour or provisions as well.[2] Though the rent must issue out of the thing demised, the lands or tenements upon which distress can be made, it must not be a part of the thing demised, and rent cannot be reserved out of incorporeal hereditaments[3], nor out of goods.[4] The amount must be certain, or capable of being reduced to certainty,[5] and must be reserved to the lessor,[6] and not to a third party. The rent must be paid, even if the premises be burnt down, unless there is a stipulation to the contrary[7]; and the landlord can take insurance money which he effected on the premises, and still claim the rent[8]; and it is no answer to non-payment of the rent, that the landlord failed in making such repairs as he covenanted to do.[9] Prior to the Judicature Act of 1881, the tenant could not set off against the rent, necessary repairs made by him,

[1] This phrase is nō longer strictly correct, because the reversion may now be merged or surrendered, and the rent remain intact. R. S. O. cap. 136, sec. 8.

[2] Deane Con. 48.

[3] Co. Litt. 47 a.

[4] Spencer's Case, 5 Rep. 16 a.

[5] *Daniel* v. *Gracey*, 6 Q. B. 145.

[6] *Chetham* v. *Williamson*, 4 East, 469.

[7] *Holtzappfel* v. *Baker*, 18 Ves. 115.

[8] *Leeds* v. *Cheetham*, 1 Sim. 146.

[9] *Surplice* v. *Farnsworth*, 7 M. & G. 576.

which the landlord covenanted to do, for this was a cause of cross action.[1] But it was otherwise if the landlord directed the tenant to repair.[2] And if the tenant is forced to pay a charge on the land,[3] or if the landlord agreed that a debt should go in satisfaction of the rent, it will be a sufficient payment.[4]

Six years of arrears of rent can be sued or distrained for under our statute[5]; but the rent itself is not barred till after ten years.[6]

The lessee is, like any other debtor, bound to find out his creditor, the lessor, and tender the rent to him.[7]

Rent now accrues from day to day, and is apportionable in respect to time accordingly.[8] So that, if one-fourth of a quarter had elapsed when the term or rent is determined, only one-fourth of the quarter's rent can be claimed. This is payable at the end of the quarter, or whenever the next payment would have been due. Apportionment takes place whenever the term is determined by re-entry, death, or otherwise.

The landlord, since 4 Geo. II., cap. 28, sec. 5, can assign the rent, and the assignee can distrain for it.

The covenant for payment of the rent may be entirely useless if one of the lessees omit to execute the lease.[9]

To Pay Taxes.—This includes all taxes, rates, duties, and assessments, whether municipal, parliamentary, or otherwise, then or thereafter chargeable upon the premises, or payable by the lessor on account of the premises.

[1] *Taylor* v. *Beale*, Cro. Eliz. 222 B. N. P. 177.

[2] Gilbert on Debt, 442.

[3] *Dyer* v. *Bowley*, 2 Bing. 94. See, however, as to taxes under our short forms, held otherwise, *Grantham* v. *Elliott*, 6 O. S. 192.

[4] Gilbert on Debt, 443.

[5] R. S. O. cap. 108, sec. 17. The covenant to pay rent is independent of this.

[6] R. S. O. cap. 128, sec. 4.

[7] *Haldane* v. *Johnson*, 8 Ex. 689.

[8] R. S. O. cap. 136, secs. 2-3.

[9] *Piper* v. *Simpson*, 6 Ont. App. 175.

This covenant has been held to cover a special rate created by a corporation by-law, as well as all the taxes[1]; and where a tenant covenanted to pay rent without reduction thereout for or by reason of any matter or thing whatsoever, he cannot claim a deduction for the amount of taxes paid by him for the house and premises demised.[2]

Where a lease is silent as to taxes, the landlord must pay them,[3] and the tenant, if compelled to pay them, may deduct them out of his next payment of rent.[4]

To Repair. This covenant is extended to mean that the lessee will well, and sufficiently repair, maintain, amend, and keep the demised premises, with the appurtenances, in good and substantial repair, and all fixtures and things thereto belonging, or which, at any time during the said term, shall be erected and made when, where, and so often as need shall be.

A covenant under the Act, on the part of the lessee, to rebuild in case of fire, has been construed to be a continuing covenant; and so, where the lessee covenanted that, on the event of the said buildings being destroyed by fire during the said term, he will immediately rebuild, to an equal amount; and after covenanting "to repair," there followed the covenant that he will erect, put up, and build upon said demised premises, a good, substantial dwelling-house, and other buildings, to the value of not less than $2,000, and that at the end, or sooner determination of said term, from what cause soever, he will leave the said buildings, and all buildings and fences erected by him upon said premises thereon, and the same property shall be the property of the lessor—it was held that on the premises being burnt a second time, the lessee was bound to rebuild.[5]

It will be noticed that this covenant does not except fire, but the subsequent covenant to leave the property in good

[1] *Re Michie and the Corporation of Toronto*, 11 C. P. 379.

[2] *Grantham* v. *Elliott*, 6 O. S. 192.

[3] *Dove* v. *Dove*, 18 C. P. 424.

[4] R. S. O. cap. 230, sec. 4 (Assessment Act.)

[5] *Emmett* v. *Quinn*, 27 Chy. 420. This case is now before the Court of Appeal.

repair does. *Semble*, that the covenants should be read together, being *in pari materia*, and that to make them consistent the exception of fire must be held applicable to both.

To keep up Fences. This covenant includes the walls of or belonging to, the demised premises, and should not be omitted; and further, to make anew any parts of the walls or fences that may require to be new made, in a good and husbandlike manner, at proper seasons of the year.

And not to cut down Timber. This prohibits hewing, felling, cutting down or destroying any timber or timber trees, or to cause or knowingly permit or suffer the same to be done, without the written consent of the lessor. But the tenant can cut for necessary repairs and for firewood, and, if specially set out in the lease, for the purpose of clearance.

If tapping trees has the effect of destroying or shortening the lives of the trees, then the lessee, under this covenant, is prohibited from so doing.[1] In this case the jury found it had such destructive effect.

Vice-Chancellor Ferguson, in the recent case of *Lancey* v. *Johnson*,[2] granted an interim injunction to restrain a lessee from boring for oil on the demised premises, where the lease contained no covenants on the part of the lessee other than to pay rent and to pay taxes, and was silent as to any right on the part of the lessee to bore for oil.

To enter and view state of Repair, etc. This reserves to the lessor the right for himself and his agents, to enter the premises, at all reasonable times, and examine their condition. Any repairs necessary to be made, must be done within three months after the lessor has given written notice to the lessee, and the notice must be left at the premises.

To leave in Good Repair. There are three separate covenants as to repair, two referring to the property during the term, and the third, as to the condition of the premises when the tenant leaves them. This last covenant is, that

[1] *Campbell* v. *Shields*, 44 Q. B. 449.
[2] 29 Gr. 67.

he will leave the premises in good repair, and that includes the appurtenances, buildings, erections and fixtures thereon. Good repair means good and substantial repair and condition—reasonable wear and tear, and damage by fire only excepted.[1]

Not to Assign or Sublet Without Leave. This covenant restricts the alienation of the demised premises in any way, without the written consent of the lessor, his heirs or assigns.

The lessee is at liberty to assign or sublet the premises leased to him, unless there be a stipulation to the contrary in his lease. If he covenants not to assign, he may underlet, though not for the whole term, as that amounts to an assignment; but it would seem that the converse case does not apply. If he covenant not to underlet, he will be prohibited, it seems, from assigning.[2]

The covenant is usually worded—"Not to assign or underlet the lands or premises, or any part thereof, without leave being given by the landlord, or his agent, in writing," and is sometimes qualified by adding—"but which license and consent it is hereby expressly agreed by and between the parties hereto shall not be withheld unreasonably or vexatiously."[3]

Under this it has been held that, where the assignee was wholly unobjectionable, and the object of refusing consent was avowedly the wish to get a surrender for the purpose of rebuilding, the lessee was entitled to relief from such unreasonable and vexatious conduct.[4] It is suggested that the clause should read, that the consent of the lessor to any assignment or under-lease shall not be capriciously or unreasonably withheld, nor withheld at all, to a responsible assignee.[5] Even if the lessee do assign contrary to his covenant, the lessor does not acquire any right to the pos-

[1] See under covenant to repair, *supra*.
[2] See chapter on Assignments—Leases.
[3] Hayes, Con. 663.
[4] *Lehman* v. *McArthur*, L. R. 3 Chy. 746.
[5] Greenwood's Con. 57.

session of the indenture of lease in virtue of the breach.[1] It would, of course, be different if, on a breach of any of the covenants the lessor has reserved a right to re-enter; but, if nothing is said as to that, the lessor will only have his action of damages. Where a lease contained a proviso for re-entry, in case the lessor should assign or sublet his estate therein, or any part thereof, and it was proved that the lessee had entered into a partnership with A., and agreed that he should have the exclusive use of one room and other parts of the premises, it was held that this amounted to a forfeiture.[2]

A compulsory assignment is no breach, as where a lease is sold under *bona fide* execution; but a warrant of attorney for that purpose has been held a fraud, and a breach of the condition[3]; though not so where the debts are *bona fide*[4]; and a voluntary assignment in insolvency contrary to the statutory covenant, not to assign without leave, has been held to be a breach of the covenant and a forfeiture.[5]

The covenant is not construed harshly against the tenant. In a case where the lessee covenanted not to let, set or assign the premises, or the term estate, or premises thereby granted, or otherwise part with his interest therein, or thereto, to any person or persons whatsoever, without the lessor's consent in writing, the fact that, on leaving the country for a short time, he rented them in such a way that the tenant was to go out when required, was held not to be a forfeiture[6]; and, where there was no express provision for re-entry, but the lease made "subject to a stipulation, that the lessee should not assign without the written consent of the lessor," this was not regarded full enough to warrant ejectment by the lessor.[7] An express, positive

[1] *Elsworthy* v. *Hewett*, 4 N. R. 371.

[2] *Roe* v. *Sales*, 1 M. & S. 297.

[3] *Doe* v. *Carter*, 8 T. R. 57.

[4] *Croft* v. *Lumby*, 5 El. and Bl. 682.

[5] *Magee* v. *Rankin*, 36 Q. B. 257.

[6] *Leys* v. *Fisken*, 12 Q. B. 604.

[7] *McIntosh* v. *James*, 24 C. P. 625.

covenant, would seem to be necessary to warrant a right of re-entry—a negative covenant is not sufficient.[1]

Where there is an actual forfeiture, no notice or demand is necessary in case there is a right of re-entry on a breach of covenant not to under-let.[2]

Quiet Enjoyment. The only covenant given by the lessor under the statutory form, is that for quiet enjoyment.

This does not mean that the lessee is to quietly enjoy the premises under all circumstances, but only on his paying the rent and performing the covenants. The lessor's covenant extends only to parties claiming by, from or under himself, or his heirs, executors, administrators, or assigns—it does not refer to a disturbance by a paramount owner—such as by a mortgagee whose mortgage is created by a former owner prior to the lease.[3]

The usual covenants for title run with the land,[4] and an action on such can only be maintained by the party between whom and the covenantor there is privity of estate at the time of the breach[5]; and so, where the estate is conveyed, the vendor cannot sue on such covenants for subsequent breaches,[6] but, if only part be sold, the vendor can recover to the extent of his interest.[7]

See *ante*, under Lessor's Title.

Proviso for re-entry. This is the most important part of a lease, and the omission a serious inconvenience to the lessor. The statutory provision refers to the non-payment of rent, or non-performance of covenants or agreements. As to rent, the right to re-enter does not arise for fifteen days after the rent, or any part of it, has remained unpaid. No formal demand is necessary.

[1] *Lee* v. *Lorch*, 37 Q. B. 262. See *Bacon* v. *Campbell*, 40 Q. B. 517.

[2] *Connell* v *Power*, 13 C. P. 91.

[3] *Bellamy* v. *Barnes* 44 Q. B. 315; *Barnes* v. *Bellamy*, 44 Q. B. 303.

[4] *Gamble* v. *Rees*, 6 Q. B., 396.

[5] *Rowe* v. *Street*, 8 C. P. 217. But since the Act relating to Choses in Action, R. S. O. cap. 116, the covenant may be assignable by contract. See *Re Haisley* 44 Q. B. 345.

[6] *Scriver* v. *Myers*, 9 C. P 255.

[7] *Keyes* v. *O'Brien*, 20 Q. B. 12.

As to breach of covenants, it is not necessary to wait any time after the covenant is broken—the lessor can enter and occupy the premises, as of his former estate.[1]

The High Court of Justice will almost always relieve against the right of re-entry on payment of the rent, and it has power, by statute, to relieve as to breach of the covenant to insure. (See under Determination of Tenancy in this chapter—Forfeiture.)

Mr. Hayes, in his Conveyancing,[2] says, that the right of re-entry arises only by express grant, and cites *Jemott* v. *Cowley*, 1 Saund. 112, as to its conveying an uncertain interest. A clause of re-entry is to be construed strictly.

VI. THE DETERMINATION OF A TENANCY.

A term of years may be determined by forfeiture, by effluxion of time, by notice from either party, or by surrender.

1. Forfeiture. Unless the lessor has right to re-enter and put an end to the term by express agreement, he is not entitled to do so; and even where he has such right, if he subsequently does any act which amounts to a recognition of a subsisting tenancy, he is presumed to have waived the forfeiture. And, so, if he accepts rent, or brings an action for rent accruing after the forfeiture, he leads the tenant to believe that the forfeiture will not be insisted upon; or if he distrains, he may generally be said to have lost his right to re-enter. Frequently, also, where the tenant makes full compensation, the courts will relieve, and they always do so in the case of rent, unless accompanied by a breach of other covenants; but, in general, they will not interfere in the case of other covenants. Now, by statute, they have power to relieve as to the covenant to insure, where no fire has taken place, and where an insurance, in conformity with the covenant, is on foot, and the neglect to insure has not been due to fraud or gross negligence.[3]

[1] See *Connell v. Power*, 13 C. P. 91. But see the expanded proviso.
[2] Concise Conveyancer, 596.
[3] R. S. O. cap. 40, sec. 49.

A clause of re-entry, as has been remarked, is to be construed strictly.[1]

It has been held, in a recent case, that in the absence of stipulation, a lessor is not entitled to insist on a proviso for re-entry, on breach of any of the covenants.[2] In a lease, as it stood at common law, the lessor could re-enter for non-payment of rent, but a strict demand was necessary, which is still in force, apparently. The demand must be for the precise sum, on the exact day on which it became due, and made on the premises at a convenient hour before sunset.

Effluxion of time. Where the premises are let for a fixed period of time, no notice to quit or leave is necessary from either party.[3]

Notice to Quit. In a tenancy from year to year, no matter how created, half a year's notice, ending with the period of the year at which the tenancy commenced,[4] is necessary; and, if the tenant dies, his executors are entitled to the same notice.[5] Half a year's notice is necessary, though the rent be payable half-yearly, or quarterly.[6] Under our statute,[7] a month's notice is necessary to a monthly holding, and a week's notice to a weekly holding. No notice is necessary to determine a tenancy at will, but possession must be either delivered by the tenant, or demanded by the landlord.[8] The notice is generally a written one; but a parol notice has been held sufficient to determine a term created by parol,[9] and notice to one of several tenants in common is sufficient.[10] The notice must be half a year, not

[1] Per Lord Tenterden, C.J., *Doe* v. *Marchetti*, 1 B. & Ald. 720.
[2] *Hodgkinson* v. *Crowe*, L. R. 10, Chy. 622.
[3] *Cobb* v. *Stokes*, 8 East, 358; *Right* v. *Darby*, 1 T. R. 159.
[4] *Kelly* v. *Patterson*, L. R. 9 C. P. 681.
[5] *Doe d. Shore* v. *Parker*, 3 T. R. 14.
[6] *Shirley* v. *Newman*, 1 Esp. 266.
[7] R. S. O. cap 136, sec. 15.
[8] *Right d. Lewis* v. *Beard*, 13 East, 210; *Doe* v. *Cox*, 11 Q B. 122.
[9] *Timmins* v. *Rowlinson*, Burr. 1603. See *Legg* v. *Benion*, Willes, 43.
[10] *Doe* v. *Crick*, 5 Esp. 196.

six lunar months.[1] The only guide in this case is, that, *prima facie*, the time of payment of the rent is the commencement of the tenancy.[2] The notice may be waived by the acceptance of rent or distress for rent due subsequently to the notice.

The notice must be directed to the tenant, and any general description applicable to the whole of the property demised will suffice; and, unless the tenant is misled, a mistake in his Christian name, or a mis-description of the premises, will not invalidate the notice. The notice should be peremptory, and not in the alternative, which the tenant may accept, and bind the landlord thereby; and the time of quitting must be specified, and must correspond with the termination of the term. The notice will be construed with reference to the current year, and if too late for it, will not avail for the next year. If the time of termination is a matter of doubt, the notice may be given in the alternative, so as to hit one of two periods; and such a notice has been held to possess all the certainty that is reasonably required for the information of the tenant.

The notice should, if possible, be served on the lessee; but notice served upon the actual occupiers of the demised premises is sufficient, unless they are servants. Notice may be effectually sent through the post.[3] Where the landlord had a right to put an end to the term, in the event of his selling the property, and falsely notified the tenant that he had sold, and demanded possession, the tenant, having acted on this notice, to his loss, was held entitled to recover the damages he had sustained.[4]

Surrender. A lease may be determined by a surrender, implied in law, or a surrender by writing under seal.

A surrender will be implied at law, when the lessee accepts a new lease,[5] or a new lessee is accepted by all parties,[6]

[1] *Doe* v. *Smith*, 5 A. & E. 350. Where the time of the commencement of the tenancy cannot be proved, the notice must be served personally.
Doe v. *Forster*, 13 East, 405.

[2] See cases on Notice to Quit, Addison on Contracts, 335-345.
Cowling v. *Dickson*, 5 Ont. App. Repts. 549.
Davison v. *Stanley*, Burr. 2210.
Phipps v. *Sculthorpe*, 1 B. & Ald. 50.

or rent is accepted by the lessor from an undertenant[1]; and in the case of yearly tenant, the receipt of the key has been construed as a surrender.[2] In the former cases, the new lease must commence immediately, or be otherwise inconsistent with the old one,[3] and the second one may be of shorter duration than the first.[4]

Every surrender, other than by implication of law, must be by deed, no matter what the duration of the term may be, and it is only by this instrument that the relation of landlord and tenant can be effectually extinguished. It acts as a dissolution of the partnership, and relieves the parties from their obligations.

As to surrender of lease by wife, see *Wheelden* v. *Milligan* 44 Q. B. 174.

VII. DISTRESS.

Distress is a common law right to enter on the demised premises between the hours of sunrise and sunset, and to seize any corn, grass or other product growing on any part of the lands demised, and any personal chattels (with some exceptions) to be found thereon, for rent in arrears. The goods must be appraised by two appraisers, reasonably competent, and five days, exclusive of the day of taking, must elapse before they can be sold.[5] Within this time the lessee is at liberty either to pay the rent, if he owes it, or he can replevy the goods and contest the lessor's right to seize them for rent. The landlord cannot purchase the goods sold in this way[6]; and this extraordinary power which a landlord has, not only to distrain, but sell the goods of his tenant, or even of a stranger upon the premises, for rent, is one which ought to be strictly pursued.[7] There is no right

[1] *Thomas* v. *Cook*, 2 B. & Ald. 219.

[2] *Dodd* v. *Acklem*, 6 M. & G. 672. See, however, *Cannon* v. *Hartley*, 19 L. J. C. P. 323, where there was no entry or possession, it was held otherwise.

[3] Prideaux Con. 12.

[4] *Hughes* v. *Rowbotham*, Cr. Eliz. 392.

[5] *Burnham* v. *Waddell*, 28 C. P. 263; *Wilson* v. *Nighingale*, 8 Q. B. 1034; *Allen* v. *Flicker*, 10 A. & E. 640.

[6] *Williams* v. *Grey*, 23 C. P. 561.

[7] Per Harrison, C.J., in *Schultz* v. *Reddick*, 43 Q. B. 163.

of distress unless the rent is fixed. There must be a contract for, and an actual demise for, a specific sum.[1]

The tenant's fixtures, or his implements of trade, if in actual use at the time, cannot be distrained; nor can goods of a stranger, delivered to the lessee to be carried or wrought or managed in the way of his trade or employment; and pawned or warehoused goods[2] are generally exempt from seizure, as are beasts of the plow, etc.

In a recent case, it was held, that, where an agent for a reaping machine manufactory left a machine at a hotel, and only called once or twice, it was not exempt from seizure.[3]

The goods of lodgers are now exempt from seizure by the superior landlord, under our Ontario Statute, 48 Vic., cap. 16.

[1] *Mitchell* v. *McDuffy*, 31 C. P. 266; *Dunk* v. *Hunter*, 5 B. & Ald. 325.

[2] *Swire* v. *Leach*, 18 C. B. N. S. 479; *Miles* v. *Furber*, L. R. 8 Q. B. 77.

[3] *Mitchell* v. *Coffee*, 5 Ont. App. 525. See *Patterson* v. *Thompson*, 46 Q. B. 7.

NOTE.—A greenhouse, conservatory and hot-house, affixed to the freehold, are not removable by the tenant, and the glass roofs of these are also fixtures; but machinery for heating the same, whether resting on the arches, or passing through them, are removable. *Gardiner* v. *Parker*, 18 Chy. 26. Trade fixtures are removable, and they comprise such as can be removed without materially injuring the building. (*Hughes* v. *Towers*, 18 C. P. 287.) So, an engine and boiler put into a carpenter's shop and manufactory of agricultural implements, are trade fixtures, and removable (*Pronguey* v. *Gurney*, 37 Q. B. 347); though the saws and other machinery of a saw mill are not such. (*Richardson* v. *Ranney*, 2 C. P. 460.) No definite rule can be deduced from the cases as to what are trade fixtures, and what are not. The latest case on fixtures (*Keefer* v. *Merrill*, 6 Ont. App. 121), decided, not without some conflict of opinion, that machines are not fixtures, unless put in the building with the intention that they become part of the realty.

CHAPTER VI.

I. MORTGAGES OF LAND.

I. Preliminary.
II. Advances—Security.
III. The Statutory Form of Mortgages.
IV. Recitals.
V. Estate Clause.
VI. Proviso for Redemption.
VII. Personal Covenant.
VIII. Other Covenants.
IX. Power of Sale or Leasing.
X. The Statutory Power of Sale.
XI. Dower.
XII. Rights of the Parties.

II. DISCHARGES OF MORTGAGES.

I. PRELIMINARY.

A mortgage of land is a grant thereof, with an equity to redeem attached; and, excepting the conditions or provisos for possession, and for reconveyance to the grantor, or mortgagor, as he is called, there is very little difference between a sale and a mortgage—between an absolute and a conditional grant of land—so far as the deed of conveyance is concerned.[1]

It will be observed that the property in both cases is *granted*, and so the necessary conveying words can be identical in each, though there may be additional apt words to be used in freeholds, leaseholds, or chattels, and such is the case in practice.

[1] An agreement for a mortgage of land is apparently an interest in lands within the 4th section of the Statute of Frauds, the same as an agreement for a sale of land. See *Ante*, page 57.

There is no statutory form for mortgages, except that given by R. S. O., cap. 104, which applies only to freeholds.[1] This form uses the words, "grant and mortgage." If the instrument is to be a mortgage of freeholds, or estates of inheritance, whether in possession or remainder, then the word grant must be used to convey the fee—the Legislature added the word mortgage, no doubt to define the instrument more accurately—to leave no room for doubt in the matter.

In leaseholds, the words grant and demise are used; and in chattels, grant, bargain, sell, and assign.

Again, if the absolute conveyance requires a deed, the conditional conveyance requires one also. In general, neither a bill of sale nor a mortgage of chattels requires to be made by deed, yet it is usual to have it so.[2]

A mortgage of chattels is not made under a statutory form; but so far as creditors are concerned, must be signed, delivered and witnessed, the necessary affidavits as to *bona fides* and good consideration, made out, and then filed in the office of the Clerk of the County Court, in the same way as a bill of sale of the chattels.

Then, a deed, as a deed, has uniform formalities and solemnities. A mortgage of land is, by statute, an indenture, is made in duplicate for registration, has its date, parties, recitals, as in a deed of grant, and must be signed, sealed and delivered, witnessed, and registered in the County Registry Office, and must set out its parcels of lands the same as in an absolute conveyance.

In regard to these points, it may in general be stated, that there is no difference in the instrument, whether it be a deed of grant absolutely, or a deed of grant conditionally

[1] It is submitted that a consideration of the Short Forms Act will establish:

i. That, in sales and mortgages of land, the Acts respectively referring thereto apply only to estates for life, or in fee, whether corporeal or incorporeal, or to any undivided part or share therein.

ii. That the Act respecting Forms of Leases applies only to terms of years and not to Freeholds.

[2] See under Personal Property, *post*.

—a sale or a mortgage, in fact. The points of similarity are, of course, as important in a mortgage as in a deed; and under each of the foregoing, attention must be paid as strictly in one as in the other. When the student has mastered these necessary points, remembering that they are common to mortgages as well as to sales of land, he can then turn his attention to those parts that are peculiar to a mortgage.[1]

II. ADVANCES—SECURITY.

A mortgage, being a security that looks mainly to the lands or goods[2] mortgaged for the repayment of the money advanced by the mortgagee to the mortgagor (or, as frequently happens, a security for money already due to the mortgagee,), it is of the first importance to consider what advances can safely be made, and whether any advance at all can be made. If the intending mortgagor is already indebted to his mortgagee, then, of course, the latter may be glad to get anything he can; but, where it is a question of the prudence or safety of a loan—an advance—then, as it is not imperative, the loan can be refused, if the proposed security is insufficient. It is, of course, no part of a solicitor's duty to say whether or not the proposed security is adequate to justify such and such a loan, unless that duty be specially cast upon him[3]; but he is often called upon to form and give an opinion in the matter, and he should be at least able to suggest proper enquiries.

A borrower must, as a rule, come to the terms offered, and is generally in no better position than the adage puts him, as to his inability to be a chooser. He is not, therefore, so much in need of a solicitor as a vendor, who sells absolutely. He will have a fair notion of what money he is to get; and the terms of the rate per cent. and of repayment are not matters he enters upon without enquiry

[1] This chapter should be read in connexion with the chapter on Sales of Land. *Ante*, page 68.

[2] See *Ante*, page 47, note.

[3] *Brembridge* v. *Massey*, 32 L. T. 108.

and full knowledge obtained. Comparatively, with his mortgagee he runs no risk. He knows that, whatever words may be in the mortgage deed, even if it be on its face an absolute deed of grant, if the money he receives is, in reality, a *loan* on his land, and not the *price* for the sale of it, the High Court of Justice will give him relief on his doing equity in the matter. He cannot be charged a higher rate of interest than he contracts for, although he may suffer for not being prompt in his payments, and have to pay a higher rate than if he were punctual; but all this must be set out in the deed, and he knows of it beforehand. A solicitor may be of some use in obtaining a loan, or in modifying clauses as to interest, or as to being turned out of possession, or in the matter of applying the insurance money, if the premises are burnt down; but, generally speaking, the mortgagee has it all his own way, and the solicitor acting for him usually makes that way to be very favourable to his client, if he is to take any responsibility in the matter.

In acting for a mortgagee who lends money on a particular security, and expects to get it back again by the sale of that security, too great care cannot be exercised. Two things are mainly, of course, to be considered; the first is, will the sale of the security, under the most adverse circumstances, realize the money lent and the costs attending such sale; and, secondly, can a perfect title, for the purpose of a sale, be made out and assigned to your client. If either of these be wanting, the advance can not, or ought not, to be made.

It is true, that the personal covenant, which every mortgagor makes to repay the money, is, at all times, of some value,[1] and it may be taken into consideration with the value of the property, though not with a defect in the title. But it must be remembered that, before this covenant is available, a judgment must be obtained, and the personal chattels of the mortgagor sold—that is, where any personal chattels can be reached.

[1] Greenwood Conveyancing, page 39.

The chattels may be set off against the interest in a mortgage; and chattels do no more than represent the personal covenant, or, rather, the covenant is valuable to the extent of the chattels. A mortgagor may die after he signs the mortgage deed, and his chattels may no more than pay the other creditors' claims; still, a personal covenant is often a good part of the security, and, with an honest borrower, may be worth more than his lands.

While some relaxation may be made in the valuation, or where it may be supplemented in ways to be referred to presently, no advance should be counselled where a good title—a marketable title—does not exist. A mortgagee is not subject to any restrictions as to title, or the evidence of it, nor is time of the essence of his undertaking to complete the matter; and he is in a very different position from a willing purchaser, who may waive many points in the title through a wish to get what he has purchased.[1]

It is of little consequence, if the property is worth ten times the advance, if the title to it is not transferable to and from the mortgagee. It is the solicitor's chief duty to go through and make out such a title as can be forced on an unwilling purchaser. It rarely happens that a solicitor undertakes to value the property or recommend that a stated sum be advanced on it. He may, and does, recommend that one-half, or two-thirds of its appraised value, be lent on property, or that no sum whatever should be lent thereon; but that is comparatively irresponsible, when it is considered that he is expected to say whether or not the title is unexceptional, and that it can be conveyed to the whole world for as much as the property will bring.

The searches in the different offices, as referred to in the Chapter on Title, must, therefore, be made with more minuteness, and with less reserve, than when acting for a purchaser. For a purchaser, when let into possession, may have a safe holding title, that protects him in possession against everybody; but that sort of title is not sufficient for a mortgagee who does not expect, and may not wish, to

[1] Greenwood Conveyancing, page 39.

take possession, and who could not force his title on an unwilling purchaser. A safe holding title may do for a purchaser who, with the negative advantage of not being liable to be disturbed, has the positive disadvantage of not being able to sell; but a mortgagee needs and expects a marketable title, and no *quantum* of security will compensate for the absence of it.

As was remarked, however, a solicitor may be called upon to classify securities, so as to be able to say what proportion can be safely loaned on their appraised value.

Before a solicitor can do this, he must be conversant with the local surroundings of the property, so as to judge what may, or may not, raise or depreciate its value. City, town, or village property, is more liable to fluctuations in value than farm property—it may suddenly become increased tenfold, by reasons familiar to every resident in the place; or, by some capricious or unfortunate change, it may depreciate, and its usefulness, in a commercial sense, be gone forever. The expected railroad or factory may not be built, and so it may remain at its low figure; or the railroad may come, and cut it into triangles, leaving it worthless. A village may perversely grow on the other side, and away from the *locus in quo;* or some neighbour may erect a tannery or *abattoir* in too undesirable proximity.

Country farm property is the least liable to disastrous fluctuations, and forms the best security. Mr. Greenwood classifies securities somewhat as follows:—

1. Farms (freehold.) Fee.
2. Houses " "
3. Houses (leasehold.)
4. Mills, manufactories, mines (freehold or leasehold.)
5. Life estates.
6. Policies of insurance.
7. Furniture, stock in trade, etc.

III. STATUTORY FORM OF MORTGAGE.[1]

There are not very many material differences between the Act respecting Short Forms of Conveyances, Rev. Stat. Ont., cap. 102, and the Act respecting Short Forms of Mortgages, cap. 104. The latter is a subsequent Act; but the phraseology is not at all copied from its predecessor. "Lands" and "party" mean the same in both Acts; but it is remarkable that a mortgage under the statute should expressly limit its operation to real property within Ontario, while the Act as to conveyances is silent on that point. The law of the *situs* governs, but the High Court of Justice, can act *in personam*, no matter where the land is situate.

Every other part of the Acts and their schedule A. may be said to be identical, *mutatis mutandis*, with two exceptions. In describing what is included in the grant, in sec. 4, the Act respecting mortgages has the words, "subject always to the reservations, limitations, provisos, and conditions, contained in the grant of such lands from the Crown," which its corresponding Act has not.[2] This may be a reason for inserting these words in the forms used by the law stationers.

Sec. 3 is noteworthy. In short forms of conveyances, it is said that *any deed*, or part of a deed, failing to take effect by virtue of the Act, will be as effectual to bind the parties so far as the rules of law and equity will permit, as if the Act had not been made. The corresponding section in the Act respecting short forms of mortgages, speaks of "any

[1] The statutory form of mortgages should not be applied to Leasehold or other chattel property. The Act authorizing Short Forms of Mortgages applies only to estates in land—freehold or in fee. A mortgage of a Leasehold interest should be by way of underlease; and where there is a covenant against assigning or subletting, then the mortgage should be with expanded covenants. The courts, of course, may give effect to the *form* of a mortgage of Leaseholds under the Short Forms Act (cap. 104), so far as the rules of Law or Equity will permit; but it is very doubtful if they could look at the statute in order to enlarge the covenants and apply them to estates they were never intended to affect.

As to the effect of mortgages on land affecting chattel property thereon, see *Ante*, page 47, note.

[2] The covenant for title has this clause also.

such mortgage, or part of *such* mortgage," referring only to mortgages made in pursuance to the Act, or referring to it in some way. It is apprehended that this verbal discrepancy is an omission in the Act respecting short forms of conveyances, and whether or not makes no material difference. It is in the matter of covenants and provisos that the two statutes differ chiefly.

The covenant that the mortgagor has the right to convey is different from that of the grantor in a deed of grant. The latter does not give an absolute covenant—it is restricted by the addition of the words, " notwithstanding any act of the said covenantor." The effect of omitting these words has been to make the covenant an absolute one.[1]

The covenant for quiet enjoyment in a deed of grant gives the grantee the express right of having, receiving, and taking, the rents, issues, and profits, of the land, or any part thereof, which the mortgagee is not entitled to under this covenant. He must always account for the rent, issues, and profits, on his taking possession after default, and before his title is absolute.

The covenant as to freedom from encumbrance, differs in the two forms. In an absolute conveyance it omits all arrears of taxes, and assessments, but refers to a number of instruments, such as gifts, grants, jointures, trusts, etc., not expressly set out in the mortgage covenant.

The covenant for further assurance in a mortgage, is available only after default is made in the payment of the principal money or interest, or any part of either, or in respect of the provisions, agreements, or stipulations in the proviso.

There is no material difference in the covenant for the production of title deeds, which, in both instruments, binds the covenantors, unless they are prevented by fire, or other inevitable accident.

The covenant that the conveying party has done no act to encumber the lands, refers, in a mortgage, to the mort-

[1] *McKay* v. *McKay*, 31 C. P. 1. See *Ante*, page 19.

gagor only—in a deed of grant to the grantor, his heirs, executors, and administrators.

The general release differs only that, in a mortgage, it is, of course, subject to the proviso—in a deed, it is absolute.

The bar of dower is the same in both instruments, but under a recent Ontario Statute, the bar extends only to the purposes of the mortgage. (44 Vic., cap. 14.) A mortgagor, in addition, covenants that he has a good title in fee simple to the said lands, and that he will pay the mortgage money. The statute contemplates a covenant for insurance, which the law will hold for the benefit of the mortgagee.[1]

These three covenants and the provisos conclude the differences between the two instruments. Two of the provisos are for the benefit of the mortgagor—one making the mortgage void on payment, and the other giving him possession till default. The other provisos are for the benefit of the mortgagee—to enter and lease, or sell, in default of payment—to distrain for arrears of interest, and the proviso making the principal due whenever the interest is in default.

Unless the mortgagor has the proviso as to possession inserted, he can be turned out on the execution of the instrument, and so its importance to him is evident.[2] 'The proviso for distress is seldom availed of, and it has been held to be a mere license to hold the goods, and not at all the landlord's right to distrain.[3]

Where a mortgagee desires to have, not only his remedies as such, against his mortgagor, but also the extraordinary remedies of a landlord, so as to distrain the goods on the land for arrears of interest, in priority to an intervening mortgagee of the goods, or judgment creditors, it is not impossible that a clause can be framed in the mortgage giving him these privileges. The two relations of mortgagor and tenant may undoubtedly be created by the one

[1] *Greet* v. *Citizens' Insurance Co.*, 27 Chy. 121.

[2] The intention of the parties will be looked at where there is no redemise clause. *Superior Savings and Loan Co.* v. *Lucas*, 44 Q. B. 106.

[3] *Laing* v. *The Ontario Loan and Savings Co.*, C. L. J., July, 1881, page 423, 46 Q. B. 114.

instrument; but, so far, it appears that the statutory distress clause is not sufficient[1]; and it remains to be seen if even an attornment clause[2] will answer the purpose. The clause should, at least, state that arrears of interest should be considered as rent in arrear, and that all the powers of a landlord should expressly belong to the mortgagee, in order to distrain the same. The Legislature should restrain this monopoly of privileges on the part of the land mortgagee, or compel him to file a copy of his mortgage with the Clerk of the County Court in the county where the mortgagor's chattels are situate.

IV. RECITALS.

Ordinarily there is much less necessity for recitals in a deed of grant than in a mortgage, but, unless in special cases, as those of Loan Companies, where the borrowers are made shareholders, etc., there is no object in reciting the terms of the loan. (See *ante*, page 72-74.)

V. ESTATE CLAUSE.

The general words and the *habendum* limit the estate mortgaged according to its nature and tenure,[3] and immediately thereafter follows the clause for redemption, which is the distinguishing feature of this instrument. The grant passes the absolute or limited ownership of the mortgagor on the land, and in most cases the absolute interest in the fixtures[4]; but where a limited interest only is parted with by the mortgagor, or, for instance, where there is a mortgage by sub-lease, the fixtures do not pass unless specifically mentioned,[5] and the right to remove them will remain in the mortgagor.[6] Except in the case of a grant in fee simple,

[1] See *Laing* v. *The Ontario Loan and Savings Co.*, 46 Q. B. 114.
[2] *The Trust and Loan Co.* v. *Lawrason*, *ante*, page 47, now in appeal.
[3] See Deeds of Grant, 80-86.
[4] *Langstaff* v. *Meague*, 2 A. & E. 167.
[5] *Hawtrey* v. *Butlin*, L. R., 8 Q. B. 290.
[6] Deane Conveyancing, page 369.

something more than the operative part, however framed, is necessary to give the mortgagee a perfectly good title to the fixtures.[1]

A mortgage of leaseholds is usually effected by way of underlease, and not by assignment in order to escape liability in the covenants in case they are onerous.

VI. PROVISO FOR REDEMPTION.

The statutory form provides that the mortgage is to be void on payment of the principal and interest due thereon and the taxes, and on performance of statute labour; but there is no reconveying clause though the effect of a discharge is to reconvey the property the same as if the mortgage in question had never been made thereon.[2]

When a mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject in default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage. There must be evidence given of a loan or debt[3]; where such evidence is given, a promise to pay it will be implied[4]; and no action of covenant is maintainable on the proviso of a mortgage.[5] So, where the proviso was, "in three equal payments to be respectively made," this was held to be insufficient[6]; but where a sealed agreement is entered into, by which land is agreed to be conveyed for a stated sum, payable in a specified manner, this was held to be a covenant.[7]

A mortgagee, when advancing money, cannot bargain for the purchase of the property at a specified sum on default of payment.[8]

[1] Deane Conveyancing, page 370.
[2] R. S. O., cap. 111, sec. 67.
[3] *Jackson* v. *Yeomans*, 28 Q. B. 307.
[4] *Hall* v. *Morley*, 8 Q. B. 584.
[5] *Martin* v. *Woods*, T. T. 3 & 3 Vic.
[6] *Jackson* v. *Yeomans*, 19 C. P. 394.
[7] *Berry* v. *Garrard*, 32 Q. B. 173.
[8] *Fallon* v. *Keenan*, 12 Chy. 388.

The effect of a statutory mortgage is said to be that, on payment, the estate revests in the mortgagor.[1] In case the mortgagor dies before payment, his personal representatives are liable to pay the mortgage money, and if or when they do pay it, the land goes to the heirs; and this may be material in the rather rare cases under our law, where the next of kin are not the same persons as the heirs-at-law. In case the mortgagee die before payment, his personal representatives are entitled to the money, though, if the property itself were foreclosed, it would descend to his heirs-at-law.

VII. PERSONAL COVENANT.[2]

The covenant of the mortgagor to pay the mortgage money and interest and observe the proviso for redemption follows, and is the hold the mortgagee has on the personal or other estate of the mortgagor, outside of the property mortgaged. By means of this covenant he can sue the mortgagor, and realize by writs of *fi fa* in the sheriff's hands; and he can do this concurrently with the exercise of any other remedies he may possess.

The omission of this clause is, therefore, a serious defect in a mortgage, as, by it also, the interest in arrear may be effectually obtained from a careless debtor. It is necessary to specify the times and days, half-yearly or otherwise, on which interest is to be paid, and if a penalty is to be enforced for neglecting payment, a higher rate is first inserted, adding, that, in case of prompt payment, a lower rate would be accepted. This, in the eye of the Court of Chancery, was a totally different thing from covenanting to pay a certain rate, and, in case of default, to pay a higher one; though it is difficult to see, if the difference is one of expression only.[3] Where there is a valid agreement, and not a penalty, however, the Court will sustain a higher rate[4];

[1] Hayes' Concise Conveyancer, page 259.

[2] There is nothing noteworthy in the expanded form of this covenant in mortgages under the Act. The payment is to be made in the terms of the proviso at the days and times mentioned therein.

[3] Deane Con., page 374.

[4] *Waddell* v. *McColl*, 14 Gr. 211.

and in the same way a mortgagor may make a valid agreement that the interest in arrears may be turned into principal, thus compounding the interest.

In all mortgages executed after the 1st of July, 1880, where the principal money or interest on a mortgage of real estate is made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money, and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.[1]

No rate of interest is recoverable beyond what is shewn in such statement, if this rate is less than what would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage.[2]

The same statute[3] goes on to enact that—

No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest which shall have the effect of increasing the charge on any such arrear beyond the rate of interest payable on principal money not in arrear; provided always, that nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.[4]

In case any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the foregoing sections, such sums may be recovered back or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.[5]

[1] 43 Vic., cap. 42, sec. 1 (D.)
[2] *Ibid*, sec. 2.
[3] 43 Vic., cap. 42 (D.)
[4] *Ibid*, sec. 3.
[5] *Ibid*, sec. 4.

Wherever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, in case at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage, tenders or pays to the person entitled to receive the money the amount due for principal money and interest to the time of payment as under the foregoing sections, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage.[1]

From the stringent terms of the statute, it is evident that care must be taken in future in framing the clause as to repayment.

VIII. OTHER COVENANTS.

Of other covenants entered into by the mortgagor, that of insuring must be considered, especially if the security be house or mill property; and the condition inserted that, in the default of the mortgagor to do this, the mortgagee may do so, and add to the debt the money so advanced. It is sometimes made a condition also, though apparently unnecessary, that in case the premises, or a part of them, are burnt down, the money, if not payable to the mortgagee on the face of the policy, be applied in re-building the premises or repairing any portion of them destroyed by the fire.

Other covenants refer to repairing and to allowing the mortgagee to enter and view the state of repair; and to leases, that the mortgagee do renew his lease within the terms thereof, or do permit the mortgagee to do so at the mortgagor's expense.[2]

As has been referred to before, the practice in conveyancing has come to be that the mortgagor gives absolute

[1] 43 Vic., cap. 42, sec. 5.

[2] As to action on the covenants after release of the Equity of Redemption, see *North of Scotland Company* v. *German*, 31 C. P. 349.

covenants for title, probably for the reason that his mortgagee can make such terms with him as he pleases, and not because there is any particular intrinsic value in having absolute rather than qualified covenants. An action on these covenants would entitle the mortgagee to his mortgage money; but this can more easily be obtained by an action on the covenant for payment of the mortgage money; and very few regard a title obtained under a power of sale as more valuable because of absolute covenants in the mortgage.[1]

IX. POWER OF SALE OR LEASING.

The statutory clause, giving a power to sell or lease on default of payment, is a very important power. There may, of course, be a valid mortgage without this power, independent of the statute to be referred to presently, leaving the mortgagee to the remedies of foreclosure and an action on the covenant; but it is usual, and, in acting for the mortgagee, always advisable, to have a power of sale inserted in the mortgage. The mortgagee will desire it, if possible, without giving any notice to the mortgagor. In this rather unfair way he should, at least, extend the time for default. Thus, it is better for the mortgagee to have the clause read, that, on "default of payment for two months, he may, without giving any notice, enter and sell, etc.," than to have it on "default of payment for one month, he may, on giving one months' notice, enter, etc." The notice may be troublesome to serve, and it must be strictly observed, and must be a valid notice. The power of sale cannot be exercised by any person not within the wording of the mortgage; and a stranger may not exercise it unless expressly, or by force of the statute, the word "assigns" is supplied.[2] When the statutory form of mortgage is not used, the word assigns should never be omitted.[3]

[1] See Deane on Con. 382. See Chapter on Deeds of Grant as to Covenants. As to concealing encumbrances, see *Lovelace* v. *Harrington*, 27 Chy. 178.

[2] *Bradford* v. *Belfield*, 2 Sim. 264.

[3] *Saloway* v. *Strawbridge*, 1 K. & J. 371; *Townsend* v. *Wilson*, 1 B. & Ald. 608.

A power of leasing must be executed by the person selected for that purpose, by the power, and not by any individual on whom, by reason of intestacy, the law casts the estate; and such a lease will not be confirmed by the acceptance of rent by the remainderman.[1]

The conveyance to a purchaser by a mortgagee under his power of sale is, by grant, as owner; and, having an equitable authority to deal with the fee, an appointment would be informal.[2] Indeed, a purchaser having contracted with a first mortgagee for a sale under a power of sale, is not bound at law to accept a conveyance from the owners or encumbrancers,[3] though most conveyancers would prefer the latter way.

The sale may be made by private contract, and there is no absolute necessity to advertise the estate for sale.[4] The mortgagor's consent is not necessary, and his strenuous opposition to a sale, as made at an undervalue, does not invalidate it.[5]

As a fiduciary vendor, the mortgagee is bound to take every reasonable precaution to prevent the property being sacrificed at the sale.[6]

A second mortgagee may safely purchase from the first, selling under his power of sale,[7] even if his mortgage is under the form of a trust for sale.[8] A mortgagee cannot sell, however, pending a suit to redeem.[9] He cannot purchase at his own sale, as he is in the position of a fiduciary vendor in exercising his power of sale.[10]

Mortgagees should use proper diligence to obtain the best price, and should take care to satisfy themselves so as to

[1] *Robson* v. *Flight*, 3 N. R. 183.
[2] Haye's Concise Conveyancer, page 259.
[3] *Forster* v. *Haggart*, 15 Q. B. 175.
[4] *Daney* v. *Durant*, 1 De G. & J. 535.
[5] *Carder* v. *Morgan*, 18 Ves. 344.
[6] *Richmond* v. *Evans*, 8 Gr. 508; *Latch* v. *Furlong*, 12 Grant, 303.
[7] *Parkinson* v. *Hanbury*, 1 Dr. & Sim. 143.
[8] *Kirkwood* v. *Thompson*, 34 L. J. Chy. 305.
[9] *Rhodes* v. *Buckland*, 16 Bea. 212.
[10] *Jenkins* v. *Jones*, 2 Giff. 99-108.

prevent a sacrifice[1] of the property, before they proceed to sell. This is important in sales by private contract; and in sales by auction they should properly advertise the intended sale.[2] A trustee for sale may fix a reserved bid, and buy in, if that bidding is not reached[3]; but he runs risk in deferring a sale, or refusing a fair offer.[4]

A power to sell in order to raise a sum of money, implies, it has been said, a power to mortgage, which is a conditional sale[5]; but this is only the case when the purpose of the trust will be answered by a mortgage, for if the intention appears that a sale out and out shall be made, a mortgage will not be a valid exercise of the power.[6] It seems that a power to sell does not authorize either a partition[7] or an exchange.[8]

Executors conveying under a power of sale should not covenant for themselves, their heirs, etc., in the deed for good title, else they will be personally liable.[9]

After the power of sale is exercised, and the purchase money paid with interest and costs, the balance belongs to the mortgagor. In case there is a second mortgagee, and that he has served notice of his claim, it is safer, instead of inspecting his security, to get the consent of the mortgagor to have it paid to such mortgagee. The better way, in cases of difficulty, is to pay it into Court under the Act for that purpose.

X. THE STATUTORY POWER OF SALE.

The foregoing remarks on power of sale apply, of course, to mortgages where there is a power capable of being exercised. However, in the event of nothing being said in the

[1] *Latch* v. *Furlong*, 12 Chy. 303.
[2] Prideaux Conveyancing, 125.
[3] *Re* Peyton's Settlement, 30 Beav. 252.
[4] *Fry* v. *Fry*, 27 Beav. 144.
[5] *Mills* v. *Banks*, 3 P. Wms. 9.
[6] *Devaynes* v. *Robinson*, 24 Beav. 86; Prideaux Con. 128.
[7] *McQueen* v. *Farquhar*, 11 Ves. 467.
[8] *Frith* v. *Osborne*, L. R. 3 C. P. 618.
[9] *McDonald* v. *McDonald*, 6 O. S. 109.

mortgage as to sale on default of payment of principal or interest, or in the event of default being made in the covenant to insure, the mortgagee has now ample statutory remedies, by which he can sell, to protect himself in either contingency. By Ontario Statute of 1879,[1] the mortgagee of any hereditaments may, after six months' default, under the terms of the mortgage, proceed to sell, either by public auction or by private contract, in as full a manner as if the power had been given to him expressly by contract.

A sale under this Act has many advantages to a purchaser, not to be had where it takés place in pursuance of the terms of the mortgage; for the purchaser's title is declared to be valid though the sale be an improper one (sec. 4); and no duty is cast upon the purchaser to see to the application of the purchase money—the receipt for the purchase money is a sufficient discharge for him. Whatever estate or interest in the mortgaged premises was held by the mortgagor, can be, by deed, assigned or conveyed to the purchaser (sec. 9); and every facility is afforded as to the production of deeds and documents of title from the mortgagor (sec. 10). No power to lease is given by the Act, and the Act gives nothing except what it expressly empowers. What particularity is requisite, and how much this Act may remedy, may be seen from the case of *Bartlett* v. *Jull*, in our Court of Chancery.[2] There the notice was under the mortgage to be given to the mortgagor, his heirs, executors, or administrators. He died, leaving an infant son three years old; his widow was appointed administratrix. It was held insufficient to serve her with the notice of sale, and the purchaser was called upon to shew that the power under which he purchased was duly exercised.

The Act giving additional powers to mortgagees prescribes with great minuteness the procedure to be followed, and it is apprehended that it must be followed to the letter. A three months' notice is necessary, a prescribed form is provided,[3]

[1] 42 Vic. cap. 20.
[2] 28 Chy. 140.
[3] See under Forms and Precedents.

and the purchase money is directed to be paid to the parties entitled.

Several objections have been taken to the English Act (Lord Cranworth's Act, 23 & 24 Vic., cap. 145), of which ours is only a slightly varied copy. In the first place, the power cannot be exercised so soon as the ordinary power, as six months must elapse before proceedings can be taken. Again, three months' notice must be given, and a third objection is the particularity to be observed in giving the notice.[1]

It is apprehended that our Act will be availed of only where an omission has been made to insert the power of sale.

XI. DOWER.

In order to be able to sell or effectually dispose of the property, it is necessary that the wife of the mortgagor join as a party in the mortgage, for the purpose of barring her dower therein. In so doing, she parts with her dower only so far as may be necessary for the purpose of the security; and a purchaser must have her made a party in a subsequent sale, in order to free it from dower.[2] If a sale of a mortgaged estate is made by the Court on a mortgage in which the wife has joined to bar her dower, it is sufficient, and she need not join in the conveyance.[3]

And now, by a recent statute,[4] where an owner, whose wife has been living apart from him for two years, under such circumstances as would disentitle her to alimony, desires to mortgage his lands free from her dower, he can do so by applying to one of the Judges of the High Court of Justice; and, if the evidence is satisfactory, an order may be made dispensing with her concurrence for the purpose of barring her dower; but the order must state the value of her dower, and it is to be paid or applied for her benefit;

[1] Prideaux Con. 504.
[2] *Forrest* v. *Laycock*, 18 Chy. 611.
[3] *Moore* v. *Skinner*, 1 Chy. Cha. 59.
[4] 44 Vic. cap. 14.

and the effect of the order is the same as if she had duly executed a deed jointly with her husband. (Sec 1.)

The 2nd section is more useful, and authorizes an application where the wife is a lunatic, but not confined in an asylum. The application must be made on the certificate of the gaol surgeon wherever the wife resides, and of another medical practitioner, to be named by the judge, and an order similar to the one referred to in R. S. O., cap. 126, may be made. This section applies to sales as well as to mortgages.[1]

If the husband is seized of an estate in fee, her dower attaches; and a wife is entitled to dower out of equitable estates, no matter whether she has married before 4 Will. IV. or not.[2] A wife may not be entitled to dower if she has elected to take something in lieu of it, or by a marriage settlement, or by adultery. (Under these headings see chapter on Deeds of Grant—Dower.)

The Dower Act, 42 Vic., cap. 20, O., does not apply to mortgages made before it was passed.[3]

XII. RIGHTS OF THE PARTIES.

Where there is a proviso in a mortgage that the mortgagor is to have possession until default, he is entitled to retain such possession, and is not liable for rents nor profits, nor for waste[4]; but, where a decree for foreclosure is obtained, it is otherwise.[5] And now, where the mortgagor is entitled, for the time being, to the possession or the receipt of the rents and profits, and the mortgagee has given no notice of his intention to take possession or to enter into receipt of the same, he can sue the mortgagee for possession, or sue and distrain for the recovery of the rents and profits.[6]

[1] See Ont. Stat. 42 Vic. cap. 22, as to effect of dower.
[2] *McIntosh* v. *Wood*, 15 Chy. 92.
[3] *Martindale* v. *Clarkson*, 6 Ont. App. 1.
[4] *Wafer* v. *Taylor*, 9 Q. B. 609.
[5] *Cawthra* v. *McGuire*, 5 L. J. 142.
[6] Ontario Judicature Act, 1881, cap. 5, sec. 17, sub-sec. 5.

Where there is no proviso that the mortgagor is entitled to possession till default, the mortgagee is entitled to possession on the execution of the instrument; and if the mortgagor takes possession without such proviso, he is tenant to the mortgagee. The intention of the parties will be looked at where there is no redemise clause, in order to come to the assistance of the mortgagor and sustain him in possession until default.[1]

Whether a mortgagee has a landlord's remedies as to distraining for arrears of interest under a statutory mortgage, where, in addition to the usual distress clause, there is one for attornment by the mortgagor, is a matter of doubt. The case of *The Trust and Loan Company* v. *Lawrason* is not yet decided in the Supreme Court.[2] There are some statutory regulations and penalties relating to frauds in sales and mortgages, but these refer to the fraudulent concealment of any settlement, deed, will, etc., or falsifying pedigrees upon which the title depends, and not ordinarily to the inception of a sale or mortgage, unless it were made part of the terms.

A mortgage cannot be rectified on a parol testimony going to shew that it should include other property.[3]

As to subsequent proceedings of a mortgagor about which a mortgagee has a right to complain, see *Parr* v. *Montgomery*, 27 Chy. 521.

II. DISCHARGES OF MORTGAGE.

Under the provisions of The Registry Act,[4] any registered mortgage may be discharged by a certificate in proper form, witnessed and proved as other instruments, and registered in the proper Registry Office.

[1] *Superior Loan and Savings Society* v. *Lucas*, 44 Q. B. 106.

[2] See note at the end of Chapter II., Title to Real and Personal Property. See *supra*.

[3] *Dominion Loan Society* v. *Darling*, 5 Ont. App. Rept. 576.

[4] R. S. O. cap. 111.

The certificate, so registered, discharges the mortgage and releases the lands mortgaged, and also reconveys the original estate of the mortgagor to him; or, in the event of his death or assigning his equity of redemption, to his heirs, executors, administrators or assigns, or any person claiming lawfully by, through, or under him or them. If only a portion of the lands is to be discharged, then a release of part of the mortgaged premises is registered in a similar way, and the particular portion of land so released must be set out.

A certificate of a discharge of a mortgage is a peculiar instance of a conveyance of land without the intervention of a sealed instrument; and so, not being made under seal, it is held not to create an estoppel against the recovery of the debt, if not in truth paid.[1] Before the registration, it operates only as a receipt, and does not release the mortgagor from any of his covenants, discharge the mortgage, or reconvey the estate. Upon registration, however, the mortgage is effectually discharged, and the legal estate revested[2]; and the survivor of one of several mortgagees,[3] or one of several executors,[4] is competent to give such discharge.

Where a married woman is a mortgagee, or the assignee of a mortgagee, she can of herself effectually discharge a mortgage, and her husband is no longer a necessary party for that purpose.[5]

The absence of the residence and occupation of the subcribing witness on the face of a certificate of discharge is no objection, since the Act of 1873, if these are stated in the affidavit[6]; and it has been actually tried whether it be

[1] *Bigelow* v. *Stacey*, 14 C. P. 276.

[2] *Trust and Loan Company* v. *Gallagher*, 7 P. R. 97.

[3] *Dilke* v. *Douglas*, 5 Ont. App. 63.

[4] *Ex parte* Johnson, 6 P. R. 225.

[5] Ont. Stat. 44 Vic. cap. 10.

[6] *Stoddart* v. *Stoddart*, 39 Q. B. 203.

sufficient to have the jurat read "Toronto," instead of "the city of Toronto," when the former was held sufficient.[1]

The mortgagor is entitled to tender the discharge to his mortgagee, in order to have the same executed.[2]

[1] *Reid* v. *Whitehead*, 10 Chy. 446; and see this case as to one witness taking the affidavit of the other.

[2] *McLennan* v. *McLean*, 27 Chy. 54.

NOTE.—The effect of a statutory discharge of mortgage on an estate tail is now before the Courts in a case of *Lawlor* v. *Lawlor*. The judgment in the Court of Appeal has recently been given, but the case is now in appeal to the Supreme Court. The question is not of such general interest, as the anomaly of estates tail is of rare occurrence.

CHAPTER VII.

ASSIGNMENTS.

I. PRELIMINARY.

II. ASSIGNMENT OF LEASES.

III. ASSIGNMENT OF MORTGAGES.

IV. CHOSES IN ACTION.

V. PARTICULAR ASSIGNMENTS:
1. *Stock, Shares, etc.*
2. *Copyright.*
3. *Patent Right.*
4. *Trade Marks, Designs.*
5. *Insurance Policies.*

I. PRELIMINARY.

The absolute sale of an interest in land, or chattels, etc., is not generally comprehended under the same term as the sale of a *right* to an interest therein. One transfer is called a sale or purchase, and the other an assignment. Thus, we have assignments of contracts, of mortgages, of leases, of judgments, of *choses in action*, etc., which are all rights subsisting between parties, rather than absolute interests in the subject matter of the transaction.[1] An assignment transfers the interest of one party, who is bound up in some way with a third party. A sale contemplates only two parties ordinarily—an assignment at least three. In some assignments the consent of the three parties must be obtained before either of the original parties can transfer their interest in the contract in question—in others such consent is not necessary. The covenants originally subsisting between the parties are not affected by a transfer to an assignee, but such assignee may assume the burdens of

[1] A *chose in action* may mean both the subject matter of the thing in question and also the right of action regarding it.

the contract, and his assignor may be relieved of them by the third party. Or there may be no restriction at all, and the assignee may as completely represent the original contracting party, without the consent of the other, as the person from whom he derives title would have done.

A reference will be made in this chapter to the assignments about which a conveyancer may be expected to be familiar. The assignment of leases and mortgages will be considered first, not only on account of their connection with real estate, but also from their importance. The other assignments are more strictly *choses in action*, and refer to personal property, which will be considered presently.

II. ASSIGNMENT OF LEASES.

Of course, the first thing to be considered in the task of assigning a lessee's interest, is to find out whether he has the power of so doing—or rather, whether he is restricted from so doing. If there is no covenant to the effect that he shall not assign without the license of the lessor, then he has the necessary power. The covenant, not to assign or sublet without leave, is not a proper or usual covenant[1]; and, though in some cases it may be justifiable, it is generally unreasonable, and prejudicial to the parties concerned. The tendency is to restrain the lessee in the enjoyment of the property and the free alienation thereof, and ought never to be consented to in the lease of ground intended to be built upon. The lessee ought to be unfettered as to his enjoyment of the property and the free disposal of it; and it is unfair on the part of the lessor to insist on the lessee obtaining his sanction before he can deal with it.[2] A covenant not to assign does not affect an underlease[3] of the premises for any period less than the whole term; but an underlease of the whole term is an assignment.[4] It is doubtful whether the lessee cannot devise the whole term,

[1] *Church* v *Brown*, 15 Ves. 238; Prideaux Con. 18.
[2] Greenwood Con. 56.
[3] *Crusoe d. Blencowe* v. *Bugby*, 2 Wm. Bl. 766.
[4] *Beardman* v. *Wilson*, L. R. 4 C. P. 57.

as the authorities are conflicting on that point[1]; it is decided that a deposit of a lease for security is not a breach of covenant to assign or underlet.[2] It would seem, from the authorities, that a covenant not to underlet prohibits an assignment.[3]

Having decided whether or not the lessee's interest can be assigned, or, having obtained the necessary license or consent, it will be desirable that the assignee understand his exact position relatively to his immediate lessor, and to his lessor's lessor.

The original lessor is not much injured by an assignment. No assignment affects his rights on his lease—he can always sue his lessee for the rent, and he can ordinarily distrain, no matter who is on the premises demised. He is hurt by an assignment only where the tenant in possession lessens the value of the property, as where the new tenant is less responsible for breaches of covenant committed by him while in possession.

The assignee is liable on all covenants which run with the land by virtue of what is called privity of estate[4]; but the lessee is also liable on his contract, by virtue of privity of contract.[5] The assignee is liable for breaches of covenant by himself; but, by assigning over, he may escape all further liability. If the estate pass into the hands of a pauper, an action by virtue of the privity of the estate would not be worth much, though the original lessor would always have his action against the person with whom he contracted.

[1] Prideaux Con. 17.

[2] *Doe d. Pitt* v. *Hogg*, 4 D. & R. 226.

[3] Prideaux Con. 18.

[4] But, since the Act relating to choses in action, the covenants may be assignable by contract. Re *Haisley*, 44 U. C. R. 345.

[5] See Addison on Contracts, chap. Assignment, etc., of Contracts. In order that a covenant may run with the land, it must be inherent in the land; that is to say, the performance, or non-performance of it, must affect the nature, quality, or value of the thing demised, and its mode of enjoyment. If the covenant relates to things actually in existence, the fact that "assigns" is not expressly mentioned in the covenant is immaterial; but, if the covenant relates to things not in existence, it would appear that, in order to bind assigns, they should be expressly mentioned—*Spencer's* Case, 5 Co. 176 1. As to future erections and buildings, see *Minshell* v. *Oakes*, 2 H. & N. 793.

The lessee's position is, that he is always liable to be sued on the covenants he has entered into, but not being in occupation of the premises, he is not liable to be distrained upon for the rent; and the fact that the lessor accepted the assignee as his tenant, does not relieve the original lessor from his express covenant to pay rent.[1] Though the assignee be accepted by the lessor, as to the rent, it would seem that the lessee would still be liable in an action on his covenants.[2] He has the responsibility of the lease on his shoulders for the whole term, and the lessor can always look to him first. As a matter of fact, the lessor looks first to the goods on the premises demised, if there are any goods leviable, because the extraordinary remedy of distress is more summary, and the value sooner realized, than by the usual action. But the lessee looks on with the certainty before him, that, unless the goods realize sufficient, he will have to supply the deficiency.

In regard to the other covenants, he is in somewhat the same position, though, in practical life, he is not liable to the same extent. If his tenant pay the rent, the other difficulties as to covenants need not be seriously regarded.

The assignee's position is, that he is liable for the rent, for all covenants into which he has entered with the lessee, and for all covenants that run with the land to the lessor.

As to the first, if he does not pay the rent, the ordinary remedies by distress of the lessor, or by suit from his assignor, can be exercised against him; or, if he makes default in payment, his assignor can pay the rent, and then sue him for the same, with costs and damages in connection with such payment.[3] Ordinarily the same is true of whatever the lessee is obliged to do, which the assignee ought to have done.

In regard to any covenants entered into between the assignee and the lessee, they, of course, speak for them-

[1] *Stinson* v. *Magill*, 8 Q. B. 271.
[2] *Montgomery* v *Spence*, 23 Q. B. 39.
[3] *Ashford* v. *Hack*, 6 Q. B. 541.

selves, and the assignee may find two landlords over him; but if he fulfil the terms of the original lease, he will have nothing to fear from the lessor, and he should not enter into any further obligations with the lessee, without being prepared to fulfil them also. He can only be bound to the lessee by express covenants in the deed of assignment; and every assignment of a lease must be by deed.

Covenants between landlord and tenant, or lessee and reversioner, affecting the value or enjoyment of the property by the lessee during the term, are annexed to the estate granted, and run with the land so long as that estate continues; and the right of action upon them vests in the assignee of the term.[1] So that the assignee can call on the lessee to repair, to cleanse and repair water-courses, to supply the premises with water; can call for a renewal, and is entitled to protection under the covenant for quiet enjoyment, if such covenants are incident to the lease, though he be not named therein.

On the other hand, he will equally be liable on all covenants incident to the estate he has, notwithstanding the word "assigns" be not named in the instrument creating the same, but only, however, for breaches of the same during the time the privity of estate existed.

The mutual liabilities extended at Common Law only to the original lessor on the one hand, and any lessee or assignee of a lessee on the other; but since the passing of the Act 32 Hen. VIII. cap. 34, they apply to the assignees of both the original parties. And since the Act relating to choses in Action now Revised Statutes Ont. cap. 116, covenants running with the land, as well as other covenants, may be assigned by the conveyances between the parties; and the assignee can sue in his own name.[2]

The lessor's assignee cannot recover rent accrued due before the assignment to him[3]; and if the lessor assigns

[1] Addison on Contracts, 777.
[2] *Re Haisley* 44 Q. B. 345.
[3] *Wittrock* v. *Halliman*, 13 Q. B. 135.

his reversion before the rent becomes due, payment to his assignee is good.[1]

Unless all the estate of the lessee comes in and vests in the assignee, the original lessor cannot recover rent in an action on the covenant[2]; and if it turns out that the party sued on debt for rent is not an assignee of the premises, but at most only an under-lessee for a part of the term, there can be no action maintained against him.[3]

If the lessee covenants to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings, the assignee will be bound by it—it is a covenant running with the land.[4]

Sometimes the equities subsisting between the original parties will hold good in the hands of their assignees, as where buildings are erected on the understanding that they are to be removed at the end of the term.[5]

The position of any subsequent assignee does not differ from that of the lessee, or the first assignee under him, so far as the lessor is concerned; but each assignee is bound by the terms of his assignment to his immediate assignor. He is bound towards the lessor only so long as the privity of estate continues.

Every assignee claiming under a lessee is bound by the privity of estate only where he is clothed with the same estate as that which the lessee had on the land, at the time the covenants were entered into.[6] An under-lessee, therefore, is not responsible upon the covenants, inasmuch as he is not possessed of the estate to which they are annexed.[7]

In order to avoid any conflict with the original lessor, it is desirable, if possible, to get an under-lease for the whole term less one day, and, as no privity of estate exists be-

[1] *McDougall* v. *Young*, Don. 111.
[2] *Annis* v. *Corbett*, 1 Q. B. 303.
[3] *Lawlor* v. *Sutherland*, 9 Q. B. 205.
[4] *Douglas* v. *Murphy*, 16 Q. B. 113.
[5] *Close* v. *Belmont*, 22 Chy. 317.
[6] Addison on Contracts, 779.
[7] *Holford* v. *Hatch*, 1 Doug. 186; *Derby* v. *Taylor*, 1 East, 502.

tween the under-tenant and the lessor, the former is affected only by the covenants in the under-lease—unless by virtue of the Revised Statute alluded to. Mortgages of leaseholds are made in this way; and, as the mortgagor remains in possession, and is answerable to his lessor by distress, it is the desirable way for many reasons.

The conditions in an under-lease should correspond with those in the original lease; the fact that they do not, may enable a purchaser to rescind his contract[1]; and a contract cannot be specifically enforced against a purchaser of a lease when it is in fact a sub-lease.[2]

The same covenants in the lease and in the under-lease would seem to be construed in the same way, except the covenant to repair; for, though the covenants may be in the same words, if they are entered into at different times, they will be construed with reference to the state of the premises when each began to operate.[3] The lessee cannot recover from his under-lessee, as special damage, the value of a lease forfeited for non-repair, unless it appears that the forfeiture was solely owing to the under-lessee's non-repair.[4]

III. ASSIGNMENT OF MORTGAGES.

Where a mortgagee, who is ordinarily engaged in selling or buying mortgages, wishes to turn his security into ready money, he looks out for some one who can take his place. In the event, of course, of his mortgage being over-due, or in default, his remedies are numerous, though slow, and he may be anxious to assign his security.

The assignee will remember that, unless a man wants money, he will not sacrifice a good security; and that the best evidence, sometimes, of a security being not so good as it looks, is the fact of its being offered at an undervalue.

[1] *Waring* v. *Hogarth*, 1 Ry. & Mo. 39; *Flight* v. *Booth*, 1 Bing. N. C. 377.

[2] *Brumfit* v. *Martin*, 30 L. T. 98.

[3] *Walker* v. *Hatton*, 10 M. & W. 249.

[4] *Clow* v. *Brogden*, 2 M. & G. 39.

The two things referred to under the chapter on mortgages must therefore be considered:—

1st. Is the security ample for the money? and,

2nd. Is the title of the mortgagor a marketable one?

Where these queries are satisfactorily answered, it is, of course, desirable, if acting for the assignee—the new purchaser—that the mortgagor be made a party to the transfer, and that the original parties both covenant to pay the money advanced. The mortgagee, though probably disposed to demur to this, cannot consistently refuse, if he lays any stress upon the personal covenant of his mortgagor.

If the assignee is satisfied with the land or chattels as security, he need not insist on the personal covenants; but, as was remarked, they are often most important, and the advice of the conveyancer will always be to get them, if possible. A mortgagee in possession cannot safely transfer his securities without the assent of the mortgagor.[1]

It is desirable, on a transfer in this way, to get the amount ascertained, as the assignee takes a mortgage subject to whatever equities there may be between the original parties—and first amongst these would be an unacknowledged payment, for either principal or interest, in the mortgage. Unless the mortgagor does not intervene in the taking of the accounts, the assignee is bound by the state of the account between him and the mortgagee[2]; and the equities extend not only to the state of the account, but also to the same equities as affect it in the hands of the mortgagee.[3] The purchaser is recommended to communicate with the mortgagor; if he refrains from doing so, his assignment is subject to all existing equities, though he may not have actual notice of them.[4] In fact, the position of an assignee of a mortgage, is reduced by the authorities to that of an assignee of a promissory note after maturity,

[1] Hayes' Con. 402.
[2] *Gooderham* v. *De Grassi*, 2 Chy. 135.
[3] *McPherson* v. *Dougan*, 9 Chy. 258.
[4] *Totten* v. *Douglas*, 15 Chy. 126.

or other chose in action, and he takes it subject to all the equities regarding it.[1]

Where a purchaser, having given a mortgage to raise the balance of purchase money, paid off a prior mortgage on the property which his vendor covenanted to pay, it was held that he could not deduct the money so paid by him from his own mortgage, when it passed into the hands of an assignee with notice of the facts.[2]

The difficulties attending the case of a mortgagee in possession are at once apparent. But there is nothing to prevent a mortgagee from taking possession at a fair and reasonable rent agreed upon between them; and, in such a case, the mortgagee is not a "mortgagee in possession," in the technical sense of the term, though a subsequent incumbrancer prior to the first mortgagee entering into possession is not bound by such an arrangement; and the first mortgagee may be liable beyond the amount stipulated for.[3]

An assignee of several mortgages from the same person, though of different estates, may, if the legal right of redemption be lost, insist on consolidating his securities—that is, that one security shall not be redeemed unless all the others are redeemed also.[4]

This right of consolidating is not the same as tacking, which is abolished in this Province by statute. Tacking is the right to throw a series of debts on the same estate—consolidating is the right to make separate estates liable for one consolidated debt.[5] This right is not affected by notice, and it applies not only against the mortgagor, but against any assignee of the equity of redemption. But, where the equities of redemption in this respect are distinct, the rule does not apply.

[1] *Elliott* v. *McConnell*, 21 Chy. 276; *Baskerville* v. *Otterson*, 20 Chy. 379.

[2] *Egleson* v. *Home*, 5 Ont. App. Rep. 566.

[3] *Court* v. *Holland*, 29 Grant 19.

[4] Fisher on Mortgages, 679.

[5] Deane Con. 276.

The transferee of a mortgage cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the transfer. Every mortgagor has a right to a reconveyance of the mortgaged property upon payment of the money due upon the mortgage; and the mortgagee is charged with the duty of making such reconveyance upon such payment being made.

Where, therefore, a mortgagee, having, besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debts, transferred the mortgage without assigning the collateral securities, it was held that he was not entitled to sever the debt from the securities, and an injunction granted against his proceedings at law to recover the amount of one of the notes, pending a suit instituted by the mortgagor to redeem and settle the equities of the parties, was sustained.[1]

It is said that in a transfer of a mortgage it is important to expressly recognize the power of sale where the mortgagor is a party and no new power of sale given.[2]

There are three things to be noticed in the Deed of Transfer, or Assignment of a mortgage:

1st. The assignment of the mortgage debt.

2nd. The conveyance of the property subject to redemption.

3rd. A covenant by the transferor that he has done no act to prevent him from making the transfer.

The assignee can, since the Act[3] making choses in action assignable, sue on the mortgage debt in his own name. Unless the amount of the mortgage debt is ascertained in some way, so as to bind the mortgagor, the assignee takes subject to any equities between him and the mortgagee[4]; and in order that this may be determined satisfactorily, it

[1] *Walker* v. *Jones*, L. R. 1 P. C. App. 50.
[2] *Young* v. *Roberts*, 15 Beav. 558.
[3] R. S. O. cap. 116, sec. 7.
[4] *Martin* v. *Bearman*, 45 Q. B. 205.

is recommended that the mortgagor be made a party to the assignment.

A mortgagee who agrees to be paid his money, or is being paid off by a party other than the mortgagor, is not bound to assign his mortgage, or give the covenant in question. He can be called upon only to execute a discharge of his mortgage.

It is not necessary that the mortgage debt should be assigned on a transfer in order to retain its priority[1]; but it is imprudent not to do so, as there may be a question if the transferee can rely on the old security in the absence of such assignment, and a mesne encumbrancer may argue that the debt was extinguished.

The proper technical words to pass an estate in lands and tenements in an assignment of a mortgage are, "assign, transfer and set over," and the lands as well as the mortgage debt must be assigned. When a conveyance with the words "bargained, sold, assigned, and transferred" unto the Assignee "his heirs and assigns, the annexed mortgage and all the right, title and interest therein" of the assignor "to have and to hold the same unto the said, &c., his heirs and assigns, to his and their sole use forever," it was held that these words, though sufficient in a will, would not pass the land in a mortgage.[2] Nor will the land mortgaged pass where an endorsement was to the effect of assigning to the purchaser, "his executors, administrators, and assigns all his right, title and interest in and to the within mortgage"[4]; but the estate will pass where the interest therein is transferred in the *habendum*, though the granting part of the deed transfers the indenture only.[5] The absence of a seal, even where it purported to be under seal, would seem to be fatal.[6]

[1] *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Watts* v. *Symes*, 1 De G. M. & J. 240.

[2] *Watt* v. *Feader*, 12 C. P. 254.

[3] *Austin* v. *Boulton*, 16 C. P. 318.

[4] *Moran* v. *Currie*, 8 C. P. 60.

[5] *Doe d. Wood* v. *Fox*, 3 Q. B. 134.

[6] *Tiffany* v. *Clarke*, 6 Chy. 474.

V. OTHER CHOSES IN ACTION.

By Revised Statutes of Ontario, cap. 116, sec. 7 "every debt and *chose in action* arising out of contract shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof shall sue thereon in his own name in such action, and for such relief as the original holder or assignor of such *chose in action*, would be entitled to sue for in any court of law in this Province."

Choses in Action is a very comprehensive term. Besides debts, contracts, and other obligations, it includes everything arising out of contract (not being a tort); so that mortgages[1] and leases,[2] so far as the obligations to pay the debt or the rent, and observe the covenants, are *choses in action*. A verdict,[3] or a judgment (even on a tort[4]), is assignable; and so are bonds and all rights to personal property not in possession but which may be enforced by action, demands arising out of torts as well as contracts.[5]

The statute, it will be observed, requires the assignment to be made in writing in order to be valid *at law*, but no particular form of writing is suggested. At the time that the original statute making *choses in action* transferable, was passed (35 Vic. cap. 12. O.) there was a distinction between the phrases *at law* and *in equity*. Certain rights were enforceable only in the Court of Chancery as administering what was technically known as Equity. Amongst these rights the very frequent cases of equitable assignments of *choses in action* were to be found, which the Court of Chancery gave effect to wherever it was possible to do so, notwithstanding that the writing was very informal, or

[1] *Martin* v. *Bearman*, 45 Q. B. 205.

[2] *Re Haisley*, 44 Q. B. 345.

[3] *Anderson* v. *Radcliffe*, E. B. & E. 817.

[4] *Ex parte* Charles, 14 East, 197.

[5] See cases in Kehoe, Choses in Action, Chapter Particular Assignments, as to what have been held to be assignable. Rent accruing due is not a chose in action. *Harris* v. *Meyers*, 2 Chy. Cha. 121.

that there was no written assignment at all.[1] The Court looked at the conduct of the parties, and if everything had been done that was possible to constitute an assignment, the particular form or means adopted was not regarded as material. The Act of 1872, referred to, was passed with this doctrine of the Court of Chancery in force; and it empowered the courts of law to recognize assignments of *choses in action* at the suit of the assignee, provided he was fortified with some written document. The Revised Statute left untouched the law merchant as to Bills and Notes. In Bills of Lading it transferred the *rights* in respect of the contract contained therein to the assignee, along with the *property* which always passed in such contracts. In warehouse receipts, etc., intended to be transferred collaterally, it made a somewhat similar provision as to bills of lading, that they could be transferred by endorsement.

The assignment of Promissory notes, bills of exchange, warehouse receipts, is generally effected by endorsement either under the custom of the law merchant or the foregoing and some other statutes, but a consideration of them is not within the scope of this work.

In regard to the assignment of *choses in action*, very little can be said from a conveyancer's standpoint.[2]

Choses in action is one of the two divisions of personal property to be found in the old writers. With a few unimportant exceptions they were not assignable at law. Observations on such assignments as were formerly held to avail in equity might be useful now in assignments under our statute. Mr. Lewis in his Principles of Conveyancing has gone very fully into the subject, and his remarks are the

[1] *Bunten* v. *Georgen*, 19 Chy, 168; see cases in Kehoe, *ante*, page 43.

[2] It will scarcely be for a conveyancer to consider whether or not an assignment in writing is now necessary, or whether the rules which heretofore governed the Court of Chancery in effecting equitable assignments will now be invoked in all the Divisional Courts of the High Court of Justice. If an equitable assignment could be made without a written document, the Courts of Law, after the Administration of Justice Acts, would have been obliged, in obvious cases, to recognize it. Since the Judicature Act of 1881, all the Courts must apparently be construed as Equity Courts; and the assignee of a *chose in action* may feel disposed to offer evidences of the transfer without any written document.

more valuable, as few English writers have taken much pains to consider the question at all. The main feature of an assignment formerly was the power of attorney enabling the assignee to sue in the name of the assignor. This is of no practical utility now, but the other parts of the transfer are important.

A peculiar feature of *choses in action*, as distinguished from *choses* in possession, is that the title of the former cannot be concealed from a purchaser. Covenants for title were, however, exacted from the owner, and for this purpose, amongst others, the transfer was suggested to be by deed. As to the latter point, great stress was laid on the fact of a conclusive receipt by means of a sealed instrument; that if there was no consideration, if it was a gift, a deed would be necessary as in the case of all gifts; and that the contents of a deed were not easily varied by subsequent conversations or letters, etc.

The covenants for title referred to the existence and validity of the chose—power to assign in manner previously set out—quiet enjoyment and power to realize and recover therein, and, lastly, further assurance, which was a conditional covenant to do certain things on request. The deed of transfer had its testatum clause and sometimes a *habendum*, though the uselessness of this was conceded—its recitals setting out any *mesne* assignments—its parcels, so called—describing the choses, its words of transfer, and, most important of all, its power of Attorney. (See Forms.)

It is apprehended that the mode of transferring a *chose in action*, where there is no consideration, where it is a gift, is not altered by our statute, and that, as in the case of other personal property, a deed is still requisite, unless the property passes on delivery and that such delivery is complete and irrevocable.[1]

As to this, the act of the donor must place the fund or debt out of his unrestrained control, and appropriate it to the donee: and that will be sufficient, unless there is a

[1] Lewis' Principles of Conveyancing, 140.

proper method of transfer recognized by the law, as in the case of stocks.

And thus, in the case of a simple contract debt not due by any instrument, notice of the transfer by the donor to the debtor will place the debt out of the donor's control; so that if the debtor should pay to the donee, this notice would in equity operate as a warrant to him to do so; it is tantamount to delivery, and makes the debtor a trustee, and is a binding equitable assignment.[1]

It is sufficient if the donor declares himself a trustee of the *chose in action*—it is considered as assigned in equity.[2]

If there is a particular fund out of which the money is to be paid, it will be desirable to have that pointed out[3]; and the debts,[4] dividends,[5] insurances,[6] shares,[7] or moneys[8] intended to be transferred should be sufficiently identified. The assignment must be expressly assented to on the part of the assignee[9]; and if it is hampered with any conditions, these must be fulfilled before the benefit of the assignment passes.[10] The assignee must possess the beneficial interest and his assignment be complete before his right of action can be maintained.[11] If the debtor, trustee, or other person liable in respect of a debt or *chose in action*, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same; or he may, if he think fit, pay the same into the High

[1] *Dearle* v. *Hall*, 3 Russ. 1. 48; *Burn* v. *Carvallo*, 4 M. & K. 702-3.
[2] *Wilkinson* v. *Wilkinson*, 4 Jur. N. S. 47.
[3] See *Farquhar* v. *The City of Toronto*, 12 Chy. 186,
[4] *Kerr* v. *Reade*, 23 Chy. 525.
[5] *In re* Irving L. R. 7 Chy. D. 419.
[6] *Chowne* v. *Baylis*, 31 Beav. 351.
[7] *Lambe* v. *Orton*, 1 Dr. & Sm. 125.
[8] *Watson* v. *Wellington*, 1 Russ. & M, 602.
[9] *Scott* v. *Porcher*, 3 Mer. 662.
[10] *Muir* v. *Waddell*, 14 Chy. 488.
[11] *Wood* v. *McAlpine*, 1 Ont. App. 234; *Wellington* v. *Chard*, 22 C. P. 518.

Court of Justice under and in conformity with the provisions of law for the relief of Trustees.[1]

Whether the assignment be a gift, or for value, delivery is desirable, as it is useful to prevent subsequent alienation without the knowledge of the assignee. If an assignee gets stock transferred to him, or gives notice of his interest therein to the debtor or trustee of the chose before any prior assignee can do so, he will be protected against such assignee if he has no notice of a prior interest—but not if he has such notice.

Where the subject of the assignment is a written contract, as for a sale of land or chattels, it is usual to assign by endorsement on the document itself; and this plan will be found to possess many advantages.

The clause adding a power of attorney, as a relic of what was indispensable before the Act of 1872, is usually inserted. Its usefulness appears to be gone.

Some particular assignments are added here, without entering into the enquiry whether they are all strictly *choses in action*. Choses in possession will be considered under the chapter on Personal Property, which see.[2]

IV. PARTICULAR ASSIGNMENTS.

1. Stocks and Shares. Stock, in Joint Stock Companies, cannot be validly transferred (unless by sale under execution) until the entry thereof is made in the proper books of the company; and such entry may be refused to be made by the directors of the company if there are any unpaid calls on the stock.

It is apprehended that this is the practice in reference to the transfer of stocks or shares in banks and all such corporations, subject to some special details in their individual charters. An Act to amend the Banking Act (1879)[3] pro-

[1] 44 Vic. cap. 5, sec. 17, sub-sec. 6.

[2] *Choses in Action* do not come within the provisions of the Act respecting sales and mortgages of personal property so as to require registration. See *post*.

[3] 42 Vic. cap. 45, D.

vides that the shares of the capital stock of the bank shall be held and adjudged to be personal estate, and shall be assignable and transferable at the chief place of business of the bank, or at any of its branches, which the directors shall appoint for that purpose, and according to such form as the directors shall prescribe; but no assignment or transfer shall be valid, unless it be made and registered and accepted by the parties to whom the transfer is made in a book or books, to be kept by the directors for that purpose, nor until the person or persons making the same shall, if required by the bank, previously discharge all his, her or their debts or liabilities to the bank, which may exceed in amount the remaining stock, if any, belonging to such person or persons valued at the then current rate; and no fractional part or parts of a share or less than a whole share shall be assignable or transferable.

The practice of the Stock Exchange in England is, that the broker who buys shares, prepares the transfer deed and tenders it to the selling broker for execution; he pays the price on the transfer being transferred to him executed by the vendor, and accompanied by the vendor's certificate of proprietorship. It is not the duty of the vendor, or of the selling broker, to get the transfer registered. All he has to do is to execute the transfer deed and return it to the purchaser. It is then the duty of the latter to execute it, and leave it, with the certificates of proprietorship, at the office of the company for registration and for new certificates of proprietorship, to be granted to him in his own name. When this is done, the purchaser's title is complete.[1]

2. Copyright. Any literary, scientific, or artistic work or composition which may be the subject of copyright, is assignable in law, either before or after copyright is obtained; and the whole right, or any part of it, may be assigned.[2] Where the author has executed the work or

[1] Addison on Contracts, 125-126. The Toronto Stock Exchange was incorporated on the 7th of March, 1878, by an Act of the Ontario Legislature, 41 Vic. cap. 65. It adopted the rules then in force as to buying and selling stock, etc.

[2] Copyright Act of 1875, cap. 18.

composition for another person, or has sold the same for due consideration, he cannot obtain or retain the proprietorship of such copyright unless by a deed specially reserving such privilege to him.[1]

The Minister of Agriculture has power to make rules and regulations and prescribe forms for registering copyright under the Act. These appear by order of the Privy Council, dated 7th December, 1875.[2]

The assignment must be in writing, made in duplicate, and recorded in the office of the Minister of Agriculture at Ottawa. No form of assignment is prescribed, but the rules say that for proceedings not specially provided, any form being conformable to the letter and spirit of the law, will be accepted; and, if not conformable, will be returned for correction.[3]

3. **Patents.** Every patent for an invention, wheresoever issued, is assignable in law by a written instrument, in manner prescribed by the Commissioner of Patents in the Department of Agriculture at Ottawa; and the exclusive right to make, and use, and to grant to others the right to make and use the invention patented within and throughout Canada, or any part thereof, may be granted and conveyed by a written instrument to be registered in the office of the Commissioner of Patents at Ottawa, according to the regulations in force for the time being. Every assignment affecting a Patent for invention shall be deemed null and void against any subsequent assignee, unless such instrument is registered before the registering of the instrument under which such subsequent assignee may claim.[4]

The assignment may be absolute, conditional, or defeasable on the happening of a given event. The assignee does not profess to sell a good and undefeasable right, but merely

[1] Copyright Act of 1875, cap. 16.

[2] See O'Sullivan's Manual of Government in Canada, page 93.

[3] In preparing the assignment, care should be taken to allow, on the back of the document, sufficient space for the insertion of the certificate.

[4] Patent Act of 1872, 35 Vic. cap. 26, sec. 22, D.

such as he possesses,[1] and he is not liable to pay back the money he received if the Patent turns out to be invalid, unless he has been guilty of fraud.[2] The right to a Patent is termed by some writers an incorporeal chattel, and in England, as it was granted under the Great Seal enrolled in Chancery, it required a Deed in order to assign it.[3]

A deed is necessary in Canada for either an assignment or the surrender of a Patent. A copy of the assignment is sent to the Patent Office, and the original is returned to the person sending it, with the certificate of registration thereon.[4] The regulations as to assignment of Patents are much the same as in the Copyright Branch of the Department of the Minister of Agriculture. Forms of Assignments and Surrenders are given, and it is apprehended that these must be followed (see under Forms—Assignments). The regulations say that when forms are not specially prescribed, any form conformable to the letter and spirit of the law will be accepted, or if not, will be returned for correction.

4. Trade Marks and Designs. Every registered trade mark is assignable in law by a written instrument, which must be produced at the office of the Minister of Agriculture, where the assignee's name, etc., are entered in the margin of the Register of Trade Marks.[5]

Every Design, either as to the whole interest or as to any undivided part thereof, is assigned in the same office as a Trade Mark, and with similar formalities.

The same Act makes provision for the assignment of Industrial Designs,[6] either as to the whole interest, or any undivided part thereof, by a written instrument recorded as in the case of Trade Marks; and every proprietor of a

[1] *Hall* v. *Conder*, 26 L. J. C. P. 138.

[2] *Lawes* v. *Purser*, 26 L. J. Q. B. 25.

[3] Lincoln's College Case, 3 Coke, 63 a.

[4] The copy must be neatly written on foolscap paper (8 by 13 inches), with an inner margin of one inch and a half wide, and all papers addressed to "The Commissioner of Patents, Ottawa." (See general rules of Patent Office, September, 1872.)

[5] 42 Vic. cap. 22, sec. 14.

[6] *Ibid*, sec. 25.

Design may grant and convey an exclusive right, under any copyright, to make, use, and vend, and to grant to others the right to make, use, and vend such design within and throughout Canada, or any part thereof, for the unexpired term of its duration, or any part thereof; which exclusive grant and conveyance shall be called a license, and shall be recorded in the same manner and within the same delay as assignments.

By an Act passed in 1870,[1] every Timber Mark registered in the office of the Minister of Agriculture shall be assignable in law. The manner of assignment is similar to that prescribed for Trade Marks.

5. Policies of Insurance. Fire and Marine policies are as a rule not assignable before loss without the consent of the Company. The restrictive conditions as to assigning do not apply after a total loss, and the money payable in respect of a partial loss may be assigned.[2]

A Life Policy is a *chose in action*, such as other Policies of Insurance, but the benefits under it can be assigned without the consent of the Company.

[1] 33 Vic. cap. 36, D.

[2] *Kerr* v. *Hastings Mutual Insurance Coy*, 41 U. C. R. 220.

CHAPTER VIII.

PERSONAL PROPERTY.

I. PRELIMINARY.

II. DIVISIONS OF PERSONAL PROPERTY.

III. GIFTS OF PERSONAL PROPERTY.

IV. SALES OF PERSONAL PROPERTY AT COMMON LAW.

V. SALES OF PERSONAL PROPERTY UNDER THE STATUTES OF FRAUDS:

1. *The Note or Memorandum.*
2. *Goods, etc., within the Statute.*

VI. SALES AND MORTGAGES UNDER R. S. O., CAP. 119:

1. *Scope and Object of this Statute.*
2. *Bona fides.*
3. *Good Consideration.*
4. *Goods and Chattels within this Act.*

VII. CONVEYANCES UNDER THE REVISED STATUTE:

1. *Points of Similarity in Conveyances of Sales and Mortgages.*
2. *Points of Disagreement.*
3. *Form of Conveyances under the Statute.*
4. *Rights of the Parties thereunder.*

VIII. SALES AND MORTGAGES OF VESSELS.

IX. LEASES OF CHATTELS.

I. PRELIMINARY.

Personal property, like real estate, may be sold, mortgaged, leased, or rights respecting it assigned. Unlike real estate, no subsequent conveyance is necessary to complete the purchaser's title; indeed, the term conveyance is not properly applicable to it. Conveyance, as defined in our statutes, refers solely to land[1]; and without such definition it has been held to relate properly to real, and not to personal property.[2] It has also been held that a conveyance

[1] See Introductory Chapter.

[2] *Dickerman* v. *Abrahams*, 21 Barb. 561.

imports an instrument under seal.[1] To this may be added the testimony of almost any law dictionary. The correct text-writers in England do not speak of the "conveyance,[2]" but the "alienation" of personal property.

Personal property, being generally capable of transfer or delivery, the title to it—the *property*, as it is called—almost always goes along with *possession;* and this fact is what chiefly distinguishes the transfer of personal property, especially what is known as goods and chattels. Where delivery is capable, the law, as a rule, requires such delivery to be made, or the transaction evidenced by a writing, or that some valuable consideration pass between the parties; if there is no delivery and no consideration, then the law requires the solemnity of a deed for the effectual transfer of personal property.

The writer will endeavour to condense in this chapter the most important things to be known in regard to the transfer of personal property, tracing it from the common law down to the present. What is commonly known as chattel mortgages and bills of sale of chattels refer to our Revised Statute, cap. 119; but it will be more satisfactory if sales and mortgages are traced before this statute. In order to preserve the symmetry of plan, a few remarks will be made on Leases of Chattels—Assignments have been included in the previous chapter.

II. DIVISIONS OF PERSONAL PROPERTY.

In the foregoing chapters, we have considered the different dispositions made of real estate, such as agreements, sales, mortgages, etc. In regard to leases, it may be said that although leasehold property is personal property—chattels real—it is generally classed in conveyancing with real property. Some of the matters treated in the chapter on Assignments, though pertaining to realty, are what is

[1] *Livermore* v. *Bagley*, 3 Mass. 487, and 1 Bac. Abr. title "Bill of Sale."

[2] The word conveyance includes a will in contemplation of law. See *Doe d. Baker* v. *Clark*, 7 Q. B. 44.

called personalty savoring of the realty; the others treated therein are incorporeal rights or incorporeal chattels. The intention of the writer was to keep the two divisions of real and personal property as distinct as it was possible to do so. Any one, however, at all conversant with the nature of property in general, will see the difficulty of carrying this out completely.

It will be seen that, between land and real estate on the one hand, and goods and chattels or personal property on the other, there is a great variety of interests which are partly of one kind and partly of another. Before entering into the consideration of personal property, it will be desirable to know and understand the precise ground, if possible, it takes up in the province of property generally. Personal property is becoming every day more and more important, and several new species of it have sprung up since the early writers in our law sketched out its then boundaries.

The ancient divisions of property were (1) *lands* and *tenements*, termed *immovables*, and (2) *goods* and *chattels*, or *movables*. The simple manners of men in primitive society knew and required no technical classifications; but a difference was apparent to everyone in the land which he tilled, and in the implements, for example, by which he tilled it. Land was also called a *tenement*, as it was held under some owner; but goods and chattels were not held of any person, and never were the subject of an estate, as was the case with lands. In process of time, lands were viewed with reference to the heirs of the owner, and so the term *hereditament* was added. Lands, tenements, and hereditaments were therefore the terms applied to that species of property; and goods and chattels embraced all other property.

Along with the use of these terms, the distinction of *corporeal* and *incorporeal* property obtained, and these were applied to movable as well as to immovable property. Goods, wares and merchandises comprehended all corporeal movable property; while rents, annuities, *choses in action*, documents of title, interests in copyright, etc., were classed

under incorporeal rights of property—some of them incorporeal hereditaments, and others incorporeal chattels.

It will be perceived that these divisions were the result of a more artificial state of society than the simple ones that were in use at an earlier period; the necessity of the times gave rise to another division, arising out of the remedies which the courts gave for the recovery of property, or in regard to it, and originated a more general appellation, now in universal use. It arose in this way:—

Actions formerly were divided into real, personal, and mixed; and as the first of these concerned lands, tenements, and hereditaments, in course of time these acquired the name of *real* property—*realty*. Real property or land is defined as any ground, soil, or earth whatsoever, and includes all buildings standing or built on it, and trees, fixtures and fences upon it. The term real estate is co-extensive with lands, tenements and hereditaments, and embraces all interests in real property, except terms for years and other chattel interests in land.[1]

The actions relating to goods and chattels and rights concerning them were, for a like reason, termed personal actions, and the subject-matter of such actions came to be called *personal* property—*personalty*.[2]

The main distinction between real and personal property, as we term them, has been already mentioned—that of tenure. Real property is held by estates—there is no absolute or independent ownership in it. The Crown alone is the absolute owner. The rule is exactly the reverse in personal property. It cannot be held for an estate, and at law the ownership is absolute. There is no such thing, properly, as an estate in personal property—nor personal estate in the technical sense in which one speaks of real estate. There is what is called property in a chattel,

[1] See *re Parsons*, 4 Ont. App. 379, as to "real estate," and *The Toronto Street Railway Company* v. *Fleming*, 36 Q. B. 116, as to "lands."

[2] Personal property is that which may attend the owner's person, wheresoever he thinks proper to go. 2 *Black*, Comm. 16, 834; 3 ditto, 144. But goods and chattels were not usually called personal property till they have become too numerous and important to attend the persons of their owners. Wms. Real Property, 7.

and as the property may be separate from the possession, this becomes frequently a very material point to consider. The right of property may not only be by the possession and property in a chattel, but may be in regard to any contract respecting a chattel or otherwise. This has necessitated two divisions of personal property.

1. *Choses in possession.*
2. *Choses in action.*

In the former of these is to be classed all movable goods, tangible in their nature, and which are to be found in the possession of some one. They are corporeal, sensible things, goods and chattels, fixtures, title deeds, heir-looms, etc., etc. The latter class has been referred to heretofore. Mr. Williams, in his work on Personal Property, adds a third class—incorporeal personal property, such as personal annuities, stocks and shares, patents and copyrights. (See Chapter on Assignments.) The present chapter is confined to choses in possession.

Personal property is also divided into two great classes, *chattels real* and *chattels personal.* Of the former, all estates in land which are less than a freehold; chattels personal include movable things only, choses in possession and choses in action.[1]

By *emblements* is meant crops growing upon land—the yearly growth.

Fixtures are chattels or things of a personal nature which have been affixed to the land; they must be permanently and habitually attached to it, or must be component parts of some structure or erection, or machine attached to the freehold, without which the erection, structure, or machine would be imperfect and incomplete. A fixture cannot exist without actual annexation to the freehold, and it is necessary that the party annexing the thing owns both the thing and the soil to which it is attached. The party making the annexation must also intend to make it a permanent accession to the freehold.

[1] Mr. Herman uses this classification in his valuable work on Chattel Mortgages.

There may, however, be movable fixtures, as where a tenant has the right to remove and carry away all such fixtures of a chattel nature as he himself has erected upon the premises occupied by him as such tenant, for the purpose of ornament, domestic convenience, or to carry on trade, provided they can be removed without material injury to the land. These are personal property of the tenant, and unless exempt they can be sold as goods and chattels under an execution.[1]

III. GIFTS OF PERSONAL PROPERTY.

A gift of choses in possession may be made complete by delivery; but, if there is no delivery, a deed is necessary. A parol gift does not pass the property to the donee unless there be actual delivery with it,[2] but an effectual gift may be made of a chattel already in the actual possession of the donee without any renewed act of delivery,[3] though this has been doubted.[4] In *Rupert* v. *Johnston*,[5] in our own court, the late Chief Justice Harrison said: "The better rule now appears that a gift of a chattel *inter vivos* may be good without actual delivery, but is revocable, until the donee has made some statement, or done some act testifying his acquiescence in the gift."

The donor must part not only with the possession, but with the dominion of the property; and, when the gift is perfect by delivery and acceptance, it is then irrevocable by the donor.[6] Gifts *inter vivos*, when made perfect by delivery of the things given, are executed contracts[7]; and a gift is

[1] Herman on Chattel Mortgages, 5, 6, 7.

[2] *Queen* v. *Carter*, 13 U. C. C. P. 611.

[3] *Champney* v. *Blanchard*, 39 N. Y. 111; *Shower* v. *Pilch*, 4 Ex. 478.

[4] Mr. Lewis, in his Principles of Conveyancing, 146, says:—"If the goods are already in the possession of the donee, a mere parol gift is void, and a deed is necessary;" and he cites *Shower* v. *Pilch*, *supra*. Mr. Benjamin takes the opposite view, and so do the American authorities.

[5] 40 U. C. R. 11.

[6] *Viet* v. *Viet*, 34, U. C. R. 104.

[7] Per Wild, J., in *Grover* v. *Grover*, 24 Pick. 264.

strictly a contract.[1] If the donor has not possession of the chattel, or if it is in the hands of a bailee, or where the delivery is not easy or impossible, in these cases a declaration of trust was held good in equity.[2]

As to voluntary gifts and settlements of personal property, including promissory notes and other choses in action, see *Richardson* v. *Richardson*, L. R. 3 Ex. 686; *Kekewick* v. *Manning*, 1 De G. M. & G. 176.

As to gifts of money by cheque, see *Bromley* v. *Brunton*, L. R. 6 Eq. 275, and *Jones* v. *Lock*, L. R. 1 Chy. App. 25.

As to gifts *causa mortis* in trust, see *Sheedy* v. *Roach*, 124 Mass. 472.

The gift may be effectually transferred to the donee by a deed poll and any form of words signifying an intention to transfer will be sufficient in the operative part. It is recommended to recite that a gift is intended, so that there may be no implied resulting trust; but it is not necessary to state that it is done for natural love, affection, etc. No words of limitation of estate are necessary; in law there is no estate in a chattel personal, though it was held that there may be such estates in equity. A grant or assignment passes the whole interest, unless the contrary is expressed. If the donor has any property to transfer, the deed transfers it; but, so far as his right to transfer it does not at present extend, the whole is executory, and the right of the donee lies only in contract by damages to be sought for under the covenants.

It is not usual to ask for covenants[3] to title in a gift, unless the donee wishes to secure himself in the enjoyment of it, as where a father gives an advancement to his son by way of gift. Although the gift pass nothing, still the donee may recover under the covenants; and so it is suggested

[1] Per Hoar, J., in *The Atty.-Gen'l* v. *The Merrimac Manufacturing Co.*, 14 Gray, 617.

[2] Lewis' Principles of Conveyancing, 146.

[3] In the case of personalty, the covenants do not *run* to the assignee unless expressly mentioned; but, if proper authority is given in the assignment, the assignee could sue in the covenantor's name. See Lewis' Principles of Conveyancing, 146, and *seq.*

to have a covenant for further assurance, for right to convey or assign, and for quiet enjoyment, as these at law even give a remedy on a gift.

There should be a power in the deed to enter and take the goods, as this power is not implied[1]; and where they come into the hands of other persons, as the donor's executors, this may be of importance.

The goods, if numerous, should be set out in a schedule, unless there are deeds or other evidences of title relating to the right to the goods, and such deeds themselves must be mentioned if they are to pass in the gift.[2]

No *habendum* is ever necessary, as there can be no tenure, no estates limited, no uses declared, nor any trust to be performed in the case of a gift of chattels. The conditions can only refer to contingencies before the property vests; and, except these, there can be no proviso or condition at law affecting personal chattels.[3]

IV. SALES OF PERSONAL PROPERTY AT COMMON LAW.

At Common Law a sale of personal property is usually termed a bargain and sale of goods.[4] This is defined to be a present transfer of the absolute or general property in a thing for a price in money. Besides such essential elements as are necessary to every contract, referred to before, there is in a contract for the sale of personal property some particulars proper to be observed. That there should be parties competent to contract and a mutual assent, is something to be expected in all contracts or agreements; but in regard to personal property there must be a transfer of the absolute or general property in the thing sold, and a

[1] *Williams* v. *Morris*, 8 M. & W. 488.

[2] Lewis' Principles of Conveyancing, 146, 162.

[3] The precedent given among the Forms and Precedents, *post*, is taken from Lewis' Principles of Conveyancing, and seems to have been carefully prepared.

[4] Benjamin on Sales, page 2, *Makaness* v. *Long*, 85 Penn St. 158.

price in money either paid or promised. If any of these ingredients be wanting there is no sale.[1]

Unless the general or absolute property passes there is no sale. A special property may, however, be transferred as a *pawn* or *pledge*, which does not constitute a sale.[2]

No other but a money consideration, either in cash or credit, will constitute a sale; if the goods are given in exchange for other goods, it is an *exchange* or *barter*.[3] Where no consideration is given it is not a sale but a *gift*; and where a person receives a chattel to keep for a certain time and to become owner of it then if he has paid the stipulated price, but if otherwise to pay for its use, this is not a sale but a *bailment*;[4] and, lastly, where by the terms of a contract one party is to take goods of another and return monthly the amount of sales at the prices charged by the latter, who will furnish the former with all goods in his line, this is not a sale of goods but a *consignment* of them.

At common law no writing whatever was necessary to effect a bargain and sale of goods; the property immediately passed to the buyer on the mutual assent of the parties to the contract. If the property in the goods was not immediately to pass to the buyer, but was subject to certain conditions, the transaction was not termed a contract, but an *executory agreement*.

A sale, as was said, contemplates a present transfer; where, therefore, the thing has ceased to exist, the sale is void, as the assent of the parties was founded on a mutual mistake of fact, there being no subject-matter for a contract, and the contract was, therefore, never completed.[5] But a thing not yet in existence, but which may exist, can be the subject of a sale or an agreement to sell, such as a crop of

[1] *Holliday* v. *Holgate*, L. R. 3 Ex. 299.

[2] See cases in Benjamin on Sales, 3.

[3] See *South Australian Ins. Co.* v. *Randell*, L. R. 3 P. C. C. 101.

[4] *Gooderham* v. *Marlatt*, 14 U. C. R. 228; *Dodds* v. *Durand*, 5 U. C. R 623. See *Moore* v. *Sibbald*, 29 U. C. R. 487, as to sale with right to repurchase.

[5] *Farrar* v. *Nightingale*, 2 Esp. 139.

hay to be grown on a man's field, etc. A man, however, cannot sell personal property in which he has no interest or a mere possibility coupled with no interest; he can sell whatever he has a present interest in[1]; and he can agree to sell his interest in chattels as soon as they are acquired—equity compelling him to carry out his contract as soon as he is in a position to do so.

Where the price is fixed it is of course part of the contract: but if not so, then it may be determined by other means, such as by arbitration, valuation, etc. If nothing is said as to the price the law will imply a reasonable value for it—generally the market price at the time and place of the delivery.

On a sale of goods there is no implied warranty of a title to them, unless by the particular custom of a trade, or where the goods are sold in a shop professing to deal in such things. But the sale of goods for a particular purpose, or with the knowledge that they are to be applied to such purpose, implies a warranty for their fitness for it.

The rule requiring the vendor to be the owner has some exceptions; a sale made in market overt is good, though the vendor had no title; but it would be difficult to say if there is any such thing as market overt in this Province, in the sense in which it is used in England. In the case of *Crane* v. *London Dock Company*,[2] the late Chief Justice Cockburn expressed an opinion that a sale could not be considered as made in market overt, "unless the goods were exposed in the market for sale, and the whole transaction begun, continued and completed in the open market, so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them and to prevent their being sold."

Any knowledge to the purchaser of his vendor's want of title will be fatal to his own, even if the purchase were made in market overt.

[1] Benjamin on Sales, 83.
[2] 5 B. & S. 313.

Persons entrusted with the possession of goods or the documents which are the *indicia* of the property therein may, if the nature of their employment points to the possession of such goods, be *primâ facie* entitled to sell.

On a sale of chattels there should be a covenant or a warranty as to title expressly given as in a sale of lands. It seems that the word "property" used by the seller or donor in any transfer of personal property, implies title thereto; and any verbal declaration that the vendor is entitled, made at or before the sale, is a warranty. In other respects the maxim *caveat emptor* generally applies.

V. SALES UNDER THE STATUTE OF FRAUDS.

Thus stands the sale of goods at Common Law. The Statute of Frauds,[1] however, materially altered this as to the authentication of the contract. Under it no sale of goods, wares, or merchandises of the value of £10 sterling[2] or upwards shall be allowed to be good, except—

(1) The buyer shall accept part of the goods so sold and actually receive the same;

(2) Or give something in earnest to bind the bargain, or in part payment;

(3) Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized.

A subsequent Statute, Lord Tenterden's Act,[3] extended this section of the Statute of Frauds to executory contracts, and now both statutes are read together.[4]

The points material in our present enquiry relate only to the sufficiency of the note or memorandum in writing, and also as to what are goods, wares, and merchandises within the Statute. As to the first of these, the note must contain

[1] 29 Car. II., cap. 3, sec. 17.

[2] In Ontario, of the value of $40 or upwards; R. S. O. cap. 117, sec. 11.

[3] 9 Geo. IV., cap. 14, sec. 7.

[4] *Scott* v. *Eastern Counties Railway Company*, 12 M. & W. 33; *Harman* v. *Reeve*, 18 C. B. 587.

the names or descriptions of the parties, and the description may suffice for the name; the memorandum must show, not only who is the person to be charged, but also the party in whose favour he is charged.

The note or writing must be a memorandum of "the bargain," and it must contain the whole bargain between the parties, and so must contain the price, when that is agreed upon. The other terms of the contract must be so expressed as to be intelligible.

The memorandum may be on several pieces of paper, or may be written at different times; but they must be consistent, and must refer to each other without the necessity of introducing parol evidence, and it is no objection that it is written in pencil.

The other question to be decided is, what are goods, wares, and merchandises within the statute?

It does not apply to shares, stocks, documents of title, choses in action, and other incorporeal rights in property. It may be expected also, that any interest in land under the 4th section of the Statute of Frauds is not within the 17th section. Where the growing crop is to be severed before the property passes, it would generally seem to be goods and chattels; where the property passes before severance, if *fructus industriales*, the 17th section applies; if *fructus naturales*, the 4th section applies. Whether *fructus industriales*, while growing, are still goods, wares and merchandises, does not appear to have been decided. Where the land is agreed to be sold, the vendee takes from the vendor the growing crops the latter being considered part of the land.

A chattel intended as a fixture to the freehold is not within the 17th section of the statute.

A contract for the sale of growing timber is, as a general rule, a contract for the sale of an interest in land.[1]

This is a very hurried *resumé* of what are the main decisions on this important statute, so far as we are concerned.

[1] See recent case of *Summers* v. *Cook*, 28 Chy. 179.

The exhaustive book of Mr. Benjamin on Sales, especially the last edition, of 1881, will supply a number of authorities on almost every point. A good feature of this edition is the reference to cases in our Canadian Courts.

VI. SALES AND MORTGAGES OF GOODS AND CHATTELS UNDER R. S. O., CAP. 119.

1. Object of this Statute. We have seen that at common law no writing was necessary for a sale of goods and chattels; nor is it necessary that a mortgage of chattels should be in writing. An unwritten mortgage is valid between the parties, the same as an absolute sale of chattels.[1] It will be desirable, under the Revised Statute, to consider sales and mortgages at the same time.

A sale of chattels transfers the title and the possession—a mortgage of chattels transfers also the whole legal interest and the possession, but subject to be defeated by the performance of a condition. A chattel mortgage is more than a mere security; it is a conditional sale of the thing mortgaged, and operates to transfer the title to the mortgagee, to be defeated only by the full performance of the conditions. It is more than a lien or security for the debt; it is an absolute pledge to become an absolute interest if not redeemed in a certain time. It is neither a sale, nor a pledge, though it partakes of the nature of both. A pledge or pawn only gives a special property in the goods, allowing the pawnee to detain them for security—the general property remains in the pawnor.

As between a sale and a mortgage, it may be stated generally, that, whenever the conveyance is intended as a security for money lent, it will be held to be a mortgage; and if this is a matter of doubt, it will also generally be construed to be a mortgage.[2]

[1] And actual delivery is not necessary; constructive delivery will be sufficient in a mortgage. *Myerstein* v. *Barber*, 2 L. R. C. P. 52. *Coote* on Mortgages, 426.

[2] *Mr. Herman*, Chattel Mortgage, page 68, says, that any condition in a lease, giving the lessor a lien upon the tenant's property as security for the rent, is a chattel mortgage; and also that a lease, providing that the

The condition or defeasance in a deed, defeating the conveyance, need not necessarily be in the same instrument, but it must be part of the same transaction; and an instrument absolute, on the face of it, may be shewn *aliunde* to be a mortgage.

An equity to redeem must be reserved, either in the form of a condition, avoiding the transfer upon payment at the appointed time, or in the form of a re-assignment.[1]

In regard, therefore, to absolute and conditional sales, the common law requirements were remarkably simple, and it is only in regard to absolute sales that any statutory regulations were made. These were the Statute of Frauds, and Lord Tenterden's Act, already referred to; and they are the only ones, so far as the immediate parties to the transaction are concerned.

There are no statutory regulations affecting the immediate parties to chattel mortgages.[2]

The Revised Statute of Ontario, cap. 119, is now to be considered in view of this state of the law. This statute does not impose any new formalities in regard to the sale or mortgage of goods and chattels, so far as the immediate parties are concerned. The law in that respect is precisely what it was before our Provincial Statutes, or what is now our Revised Statute, cap. 119, came in force. This statute says in effect, to the purchaser or mortgagee, if you wish to protect yourself against the creditors, or against any subsequent purchaser or mortgagee in good faith of your vendor or mortgagor, as the case may be, there are certain additional formalities to be observed before your title is unimpeachable from any quarter. These formalities are set out in the Revised Statute; but if the purchaser or mortgagee has no concern in regard to the creditors, or subsequent pur-

lessor is to have full title, with the privilege of taking full possession, at any and all times, of any and all the products of the farm in payment of the balance due on rent, is a chattel mortgage, and invalid if not recorded as required by law. (*Johnson* v. *Crofoot*, 53 Barb. 574.)

[1] *Coote* on Mortgages, 430.

[2] In sales under the Revised Statute, *under* the value of £10 sterling, a written conveyance is necessary, though not necessary at common law, nor under the Statute of Frauds. See *infra* as to Ships.

chasers, or mortgagees of the person with whom he is dealing, then he is not called upon to consider any requirements of this statute. But if so, there are two alternatives before him; either the goods and chattels must be delivered up immediately, and there must be an actual and continuous retention of them in the possession of the new owner or mortgagee, and out of the possession of the former owner; *or*, there must be a *conveyance* made of the goods and chattels, as prescribed by the statute. It is with the latter alternative only that we have to deal, as in the former case no writing was required, either at common law or under the Statute of Frauds. If the vendor or mortgagor can sell the goods and chattels at all, the sale or mortgage is unimpeachable where the possession of them passes immediately, actually, and continuously out of the one party and into the other, and no writing or conveyance is necessary.

"The object and intent of the act were the benefit and protection of creditors, and to prevent their being defrauded by persons remaining in the actual possession of goods and chattels, and keeping up the appearance of being the owners of them, after having disposed of them by bill of sale, either absolutely or by way of mortgage, by requiring, in effect, that when such disposal takes place, and is not accompanied by an immediate delivery, and an actual and continued change of possession, the true transaction, effecting such disposal, shall be put in writing, and registered, with affidavits, verifying the truth of the transaction.[1]"

2. **Bona Fides.** Where a conveyance, as the statute calls it, intended to operate, either as a sale or mortgage, is necessary, the first essential requisite is that the transaction be *bona fide;* in other words, that the retention of the goods in the owner's possession, after he has made an assignment of them, be not fraudulent. As is well known, the possession of goods so assigned raised a presumption that the transaction is fraudulent. The requirements which

[1] Per Mr. Justice Armour, in *Hamilton* v. *Harrison*, 46 Q. B. p. 135.

this statute demands are intended to rebut that presumption, and evidence is accepted, so far as the conveyance is concerned, by the affidavit of the purchaser or mortgagee, otherwise the transaction would be *prima facie* bad.[1] The statute shifts the presumption on a sufficient affidavit accompanying the conveyance, so as to give presumptively the legal title in the purchaser or mortgagee.

Whether a mortgage be fraudulent or not, as against creditors or subsequent mortgagees, is a matter of fact lying chiefly within the knowledge of the client, and not ordinarily something which a solicitor can be called on to advise. He may be asked if the circumstances, as stated, disclose a fraud; if so, the conveyance cannot be carried out.

Generally speaking, all transactions made to hinder, defeat, and delay creditors, or defraud them, or defraud subsequent purchasers, are void under the statutes of Elizabeth; and a voluntary mortgage, not communicated to creditors, and kept to be used, if convenient, is fraudulent thereunder.[2]

The transfer of a debtor's entire property to one creditor can scarcely be upheld as against the others; but a creditor who comes to the assistance of a debtor with a sum of money, by way of substantial advance, will be protected to the extent of such advance, if it be done to enable the debtor to carry on his business and pay his other creditors.[3]

If there is a judgment against the debtor, and a writ of execution in the hands of the sheriff, the execution binds the goods and chattels from the time of delivery to the sheriff; and an intending purchaser or mortgagee should satisfy himself on this point, otherwise the execution creditor can disregard the conveyance made by the debtor. But a judgment of itself does not bind the goods and chat-

[1] The result of the cases is, that possession of goods and chattels after an assignment of them, does not of itself constitute fraud, as against creditors, but is only *prima facie* evidence of it, capable, like any other evidence of a similar kind, of being rebutted or explained. *Coote* on Mortgages, 430.

[2] *Cracknall* v. *Janssen*, 11 Chy. D 1 C. A.

[3] See *Robins* v. *Clark*, 45 Q. B. 362.

tels; and a valid mortgage, or a bill of sale of them, may be made between the signing of the judgment and the placing of the writ in the sheriff's hands. It would be difficult, however, to conceive of a case in practice where this is possible, if the intending purchaser or mortgagee was made aware of the judgment. His oath would be pledged that the transaction was not effected by him to defraud this particular judgment creditor. It is true, that a creditor with a judgment may not eventually turn out to be an execution creditor. Judgments in the lower courts are every day set aside; and execution may never issue in favour of a judgment creditor in one of them; indeed, it may issue against him after the decision in the last court of resort. The law has wisely made a distinction between a judgment and an execution; but where there is a judgment in a final court, there would seem to be no possibility for an intending purchaser or mortgagee, who was aware of it, of making an affidavit of *bona fides*. Such judgment creditor should be a creditor so far as the conscience of the party making the affidavit is concerned.

A judgment, followed by an execution, in the hands of a bailiff, in the Division Court, does not bind the goods and chattels it appears, till actual seizure is made; though the law should be otherwise in those cases where there is no appeal.

Property in the custody of the law, as under an attachment or an execution, may be sold or mortgaged; and all the interest of the debtor, after the execution creditor is satisfied, will pass to the purchaser or mortgagee.

A tenant cannot make a bill of sale or chattel mortgage on goods liable to distress for rent, so as to cut out the landlord's prior right; and the landlord can follow the goods for thirty days, if they are removed fraudulently *or* clandestinely, no matter whether the purchaser can make the necessary affidavit or not.

3. Consideration. The *bona fides* of the transaction is, therefore, a prerequisite to the affidavit, and there can be no *bona fides* without a *valuable* consideration. There

may be valuable consideration without *bona fides*, but this will not be sufficient to support a conveyance under the Revised Statute. In the same way *bona fides* of itself, if it could be conceived without a valuable consideration, is insufficient. The two must concur in order to an effectual conveyance.

What is a sufficient consideration has been referred to herein before. A valuable consideration may be marriage, money, or money's worth, present or contingent indebtedness, or liability, as for future advancements or endorsations, etc. But a blood consideration, or a consideration of natural love and affection, is not sufficient. A gift does not appear to be within the provisions of our Act, nor contemplated by it: a gift is neither a sale nor a mortgage, and no matter what amount of good faith there may be in it, there is no legal valuable consideration. The Legislature, in framing the Act, was not concerned about people who could afford to be generous enough to make gifts to their friends; it aims at compelling people to be just towards their creditors.

Where the consideration is wholly disproportionate to the value of the goods, then there is a suspicion of fraud.

The consideration should be set out correctly, both in the body of the instrument and in the affidavit; and the precise sum should be mentioned, though it will be sufficient to say a certain sum, "and upwards." It will then be good for the certain amount. If the amount cannot be ascertained with certainty, but states a certain sum, "or thereabouts," the conveyance may be upheld, if the true transaction between the parties is disclosed in the recitals or otherwise. In a recent case,[1] it was decided by a majority of the Court of Queen's Bench, that, as a matter of law, a chattel mortgage was not avoided by the fact of its untruly stating the consideration to be $1,148, when, in reality, the amount was $1,030.80; but that such erroneous statement was a

[1] *Hamilton* v. *Harrison*, 46 Q. B. 127.

circumstance for the jury to consider, in deciding whether there was fraud or no fraud.[1]

4. What are Goods and Chattels Within the Revised Statute. The words "goods and chattels," as used in the Revised Statute, have not received any statutory interpretation, either in this Act or elsewhere.[2] It is beyond doubt that they are not so comprehensive as "personal estate," which includes leasehold estates, money, choses in action, etc.—whatever would descend to the executor or administrator on the decease of the owner. The Statute of Frauds uses the words "goods, wares, and merchandises," but the scope of that statute was clearly of a wider range than our provincial one, and more immediately concerns general commercial transactions.

The writer does not believe that the words "goods and chattels" should be separated, so as to include certain articles under goods, and certain other articles as chattels, and so arrive at their full meaning by the addition of both these articles. The view taken by Mr. Williams,[3] that goods and chattels may generally be considered as meaning the same thing, will probably be found to be correct. It has been held, if one give or grant to another "all his goods," or "all his chattels," by this do pass all his movable and immovable,

[1] Mr. Justice Armour, in delivering the dissentient judgment in this case, uses the following argument in support of his view—a view which commends itself to the conveyancer: "Take, for example, the case of an execution creditor finding a chattel mortgage filed from his debtor, all in due form, for say $1,000, the full value of his debtor's goods, and making up his mind from enquiries that this was a fictitious transaction, and directing the sheriff to seize the goods, and the mortgagee claiming them; an issue is directed, and it is shewn that only $50 was actually advanced by the mortgagee to the mortgagor; but the jury find that no moral wrong was intended, and that the chattel mortgage is an honest security for the $50; the creditor is defeated and obliged to pay all the costs, when, if the chattel mortgage had contained the true amount of $50 instead of $1,000 he would have directed the sheriff to seize and sell, the equity of redemption would have paid off the $50, and would have realized his debt."

[2] "Goods" is defined in the Act respecting contracts in relation to goods entrusted to agents, R. S. O., cap. 121, sec. 1, to include "all personal property of whatever nature or kind." It is also defined in the General Railway Act, R. S. O., cap. 165. See R. S. O., cap. 116, sec. 13; the Mercantile Amendment Act, and 43 Vic., cap. 22, sec. 45, D, Amendment to the Banking Act.

[3] Personal Property, page 2.

personal and real goods, horses and other beasts, plate, jewels and household stuff, bows, weapons and such like, and his money and his corn growing in the ground; but not the term or interest in his dwelling-house, nor his leasehold estates, unless there be some term or provision in the deed manifesting an intention on the part of the grantor that his leasehold property should pass under the general description; nor things which he hath in safe-keeping for another; nor choses in action; nor things of pleasure, such as hawks, hounds, etc.[1] If this case be taken as an exposition of the common law meaning of "goods and chattels," it may be useful in considering our Revised Statute, so far as the exceptions in the case are concerned. The English Bills of Sale Act uses the words "personal estate," and defines it to include fixtures capable of complete transfer. Under it if the owner of the inheritance disannexes them, so as to become transferable chattels, they come within the operation of the Act, so as to require registration. As fixtures are not goods, wares, and merchandises within the Statute of Frauds,[2] it will be seen that neither of these Acts can be of much assistance in determining the scope of the words in our Statute.

The provisions of our Act itself define pretty clearly what are goods and chattels. They must be—

1. Capable of immediate delivery.

2. Capable of an actual and continued change of possession.

3. Capable of being readily and easily known and distinguished.

The Act does not apply to mortgages of vessels registered under the provisions of any Act in that behalf, and there are other provisions for the sale of vessels. This is the only exception in the Act.

From the foregoing, it would appear that the goods and chattels must be actually (not constructively) capable of

[1] *Harrison* v. *Blackburu*, 17 C. B. N. S. 678, and see *Ringer* v. *Cann*, 3 M. & W. 343.

[2] Per *Parke*, *B.*, 1 C. M. & R. 275.

delivery,[1] and of such a kind that it is possible to tell one article from another. A fixture, as the name implies, is incapable of delivery; but it has been held in our own courts that the owner of the inheritance can sever the chattels from the realty, and give a valid mortgage thereon.

An interest in land, within the 4th section of the Statute of Frauds, cannot be said to be goods and chattels; nor is it clear that all goods and chattels within the 17th section of the same statute can be the subject of a chattel mortgage under our Act. It is not easy to determine whether growing crops are or are not within the chattel mortgage Act, as the authorities are conflicting. In *Laing* v. *Ontario Savings' Society*,[2] Mr. Justice Cameron, after citing Herman on Chattel Mortgages, p. 299, to the effect that growing crops, such as wheat and corn, cotton, potatoes, the annual produce of labour, and cultivation of the earth, being personal chattels, are the subject of a chattel mortgage, seems inclined to the view that no matter whether the seeds appeared above the ground or not, the land in which they are sown, in either case, sufficiently identified them.[3] In the same case, Mr. Justice Armour holds that growing crops are goods and chattels, within the Chattel Mortgage Act.[4] In the next case,[5] in the same volume of reports, where the mortgage covered, amongst other things, 15 acres of fall wheat, and 8 acres of rye, the Chief Justice and Mr. Justice Cameron held these crops to be incapable of delivery or change of possession, without change of occupation of the land, and that the mortgage, as to them, was not within the Chattel Mortgage Act. Mr. Justice Armour dissented from this view. If it were not for the words in the Act as to "immediate delivery" there would be no difficulty under

[1] Goods in a bonded warehouse do not come within the Act so as to require registration. *May* v. *The Security Loan and Savings Society*, 45 Q. B. 106.

[2] 46 Q. B. 114.

[3] *Mr. Herman*, in his book on Chattel Mortgages, at the page cited, thinks if the crops are *above* ground they can be the subject of a mortgage; if *under* the surface not so, as they have no existence as crops.

[4] Page 126.

[5] *Hamilton* v. *Harrison*, 46 Q. B. 127. The entire judgments in this case have not come to hand at the time this chapter was going to press.

the authorities in holding growing crops to be within the Act. If they are not within the Act, then does the Act include any after-acquired property?

Certain classes of goods and chattels, though not in existence at the time of the conveyance, can, nevertheless, be validly sold or mortgaged, as equity will hold such goods for the purpose of the conveyance, as soon as they come into existence, and the purchaser or mortgagee can take possession under the terms of his equitable contract. His title will prevail not only against a judgment creditor, but against a purchaser for value of the specific thing, unless such purchaser has fortified himself with actual possession without knowledge of the contract.[1] These classes of goods and chattels may be referred to two sources: 1st. Things which are the natural product, or expected increase, of something already belonging to the mortgagor; as a crop of hay, to be grown on a field; the milk, that the cows will yield during the coming month, etc. The mortgage or lien, in these cases, is restricted to all such as shall arise or proceed from the thing mortgaged. The fruits of the land and growing crops are within this class.[2] 2nd. Such property, as accrues by right of accession—as where labour is bestowed on a chattel by repairs; or where the raw material is manufactured into specific articles, such as leather, made into shoes, or where the property in a business is disposed of in part, converted into money, and new articles purchased, these vest in the mortgagee.[3]

In the latter class, there would seem to be no difficulty in deciding that the articles, referred to, are within the terms of the Act. In the former, the difficulty is in regard to *immediate* delivery and change of possession, such as the Act requires. There can be no immediate delivery of growing crops, as the learned Chief Justice Hagarty puts it, without a change of occupation of the land.

[1] *Holroyd* v. *Marshall*, 33 L. J. Chy. 193; 10 H. L. Cas. 214.

[2] *Herman* on Chattel Mortgages, 85, 86.

[3] *Ibid*, 88. See the forcible reasoning of *Mr. Herman* (Chattel Mortgages, pages 89-97), limiting mortgages on after-acquired property to these two classes.

The statute is imperative upon that point; and the fact that the goods and chattels can be delivered in the course of some months would not suffice. The crop is not only incapable of immediate delivery, as there is nothing to deliver that is recognized as a security; but the seed, covering so many acres, cannot be delivered at all, without the land accompanying it.

In the present state of the authorities, a mortgagee, who may be forced to include growing crops in his security, might try the efficacy of going upon the land, and assuming the occupation, till the crop is taken off—taking from the mortgagor, at the same time, a written acknowledgment as to the change of possession.[1]

There is room for amendment in the Act, in this respect.

VII. CONVEYANCES UNDER THE REVISED STATUTE.

1. Points of similarity in Conveyances of Sales and Mortgages. As a mortgage of goods and chattels is a conditional sale of them, it is to be expected that there are many points of similarity between the forms of the two instruments. Indeed the difference is mainly confined to the condition avoiding the sale, or the re-assigning clause in the mortgage.

The wording of the fifth section, of the Revised Statute to which we are alluding, as regards bills of Sale, and the wording of the preceding section of the Act, as to mortgages, are *mutatis mutandis*, very nearly identical. Where the possession of the goods and chattels remains unchanged, then the sale, whether absolute or conditional, must be a *conveyance*. The conveyance must be duly *executed*, and an *affidavit* of the witness to such execution, attached to the conveyance; an *affidavit* of the mortgagee, or bargainee, or one of them, or an agent, that the sale or mortgage is *bona fide*, and for good consideration, and not

[1] Where the mortgagee takes possession under an unregistered conveyance there would seem to be no question, but that the operation of the Act is excluded. See judgment of Chief Justice Hagarty in *Robins* v. *Clark*, 45 Q. B. 366.

done to permit a fraud to be perpetrated upon the creditors of the former owner of such goods and chattels; and lastly the conveyance (or in the case of mortgages, a copy thereof) is *registered* within five days, from the execution of the conveyance, in the office of the County Court, in the county wherein the goods and chattels are situate.

The transfer, whether absolute or conditional, is called a conveyance. In the section respecting Bills of sale, it is prescribed to be in writing—a conveyance, under the provisions of the Act. In the first section, one would suppose that the word mortgage included a writing in the intention of the Act; and in the fifth, that a bill of sale of goods and chattels was always without a writing. The exact converse is the case, as mortgages of chattels, before the statute, could have been by parol; but sales of them could not, unless complying with the alternatives in the Statute of Frauds. The impropriety of the word conveyance has been referred to before; and were it not authoritatively laid down, that a conveyance, under the statute, need not be by deed, a good deal might be urged on the necessity of a sealed instrument. The very first requisite is, that it be *executed*; and it will be pretty generally conceded, in our law, that execution properly means *sealing* and delivery. The courts, however, have rightly held that there must be a positive statutory enactment, to necessitate the use of a seal, in the alienation of chattel property, where such a seal was not necessary at common law; and that the common law could not be enlarged, by implication, in such a statute. As was seen a seal was not required at common law in the transfer of goods and chattels, except where a gift was intended; and it has also been seen that the Revised Statute does not apply to gifts.

The witnessing is the same in both instruments, and the affidavit of the purchaser or mortgagee calls for no special remark. In a bill of sale it must be sworn that the sale is *bona fide*, and for good consideration, the amount being set out, as in the conveyance; and not done for the purpose of holding, or to enable the bargainee to hold the goods mentioned, against the creditors of the bargainor. An

agent of the bargainee may make this affidavit, if he is duly authorized in writing, and this authority is attached to and filed with the conveyance. In a mortgage, the mortgagee must swear that the mortgagor is justly and truly indebted to the mortgagee for the sum, mentioned in the mortgage; that it was executed in good faith, and for the express purpose of securing the payment of the money justly due, or accruing due; and not to protect the goods and chattels mentioned, against the creditors of the mortgagor, or to prevent the creditors of the mortgagor from obtaining payment of any claim against him. An agent of the mortgagor, may make this affidavit; he need not be authorized in writing, but he must be aware of all the circumstances of the transaction. The fact of an agent is mentioned here as a point of similarity, because an agent is permitted in either a sale or a mortgage; but the points of disagreement in their functions are more noteworthy, and will be referred to again. Both instruments must be filed, as mentioned, within five days from execution in the proper office; but a bill of sale is not renewed as a mortgage, and so it is filed once for all. In order to keep a mortgage security alive, a renewal must be filed every year, till the mortgage debt is paid off. A description of the goods and chattels, such as the statutes provides, is necessary, and identical in both cases; and the other essentials to a contract, such as capable contracting parties, etc. The same attention must be paid to have the date within five days of the filing, to have the conveyances duly executed, and other formalities necessary in every conveyance.

2. Points of disagreement in the Conveyance of Sales and Mortgages of Chattels. It is a remarkable thing that mortgages, whether of land or of goods and chattels, should be, so far as statutory regulations are concerned, expressly limited to Ontario; and that no restriction should be made in the Acts as to sales. Regarding goods and chattels, see the Act of 1878, amending the Revised Statute, cap. 119. This amendment, without regard to the previous section of the

Act contemplates either a mortgagor or a bargainor, as residing outside of Ontario. The goods and chattels must, in both conveyances, be necessarily within the Province.

Section 5 declares that a bill of sale "shall be in writing, and such writing shall be a conveyance, under the provisions of this Act." There is nothing said about a mortgage being in writing, except in so far as the words "mortgage" and "conveyance" imply it; but as it must be executed and witnessed, and affidavits attached to it, etc., it must necessarily be in writing. It is much to be wondered at that so many objections being taken to bills of sale, some one did not insist on having it an "Indenture of conveyance, made under the provisions of the Act respecting mortgages and sales of personal property, and made, etc."

In a bill of sale, the agent of the bargainee must be authorized in writing; this is not necessary in mortgages, though, in the latter case, the agent must be aware of all the circumstances, and this must appear, either in the affidavit of the agent, or in some other way, from the mortgage, or other paper filed with it.[1]

The differences in the affidavits of the mortgagee and bargainee have been referred to before.

A chattel mortgage must be renewed every year, by filing a statement within thirty days from the end of the year, counting from the day of filing; and this applies, not only where the goods are originally situate, but also where the goods are removed to another county.[2] A bill of sale cannot be renewed, and is filed only once. Where a mortgagee sold under his power of sale, if there is no change of possession, the bill of sale must be registered, otherwise it will die out with the mortgage under which the sale took place.[3]

Where a bill of sale is a security for a debt, and so in reality

[1] *Carlisle* v. *Tait*, 32 U. C. C. P. 43. This case is in appeal.

[2] 44 Vic., cap. 12, o.

[3] *Carlisle* v. *Tait*, 32 U. C. C. P. 43.

a mortgage, then it should be renewed every year, and treated as a mortgage.[1]

The clause making the conveyance void on payment of so much money, is the distinguishing feature of a mortgage.

It is recommended by the authorities to have payment made in a chattel mortgage on demand; and where this is the case, the debt is due immediately. It is a way, however, not agreeable to the mortgagor, as he is likely to have proceedings taken against him at any time. Where no particular time is specified, it will be held to be payable within a reasonable time[2]; and where the time for payment is fixed and specified in a mortgage, the mortgagor is not entitled to any other notice.[3] Where a mortgage is given to secure one or more notes, it is payable whenever the notes mature; and, under our statute, where the mortgage is made in pursuance of an agreement for future advances, the time for repayment must not extend for a longer period than one year from the date of the mortgage. Where a note is given, payable at a certain time at a fixed rate of interest, and, at the same time, a mortgage is given to secure the payment of such note in which mortgage there is a stipulation that the interest shall be paid quarterly, semi-annually, or annually, the note and mortgage must be construed together as parts of one contract, and, so construed, the interest is payable at the time specified in the mortgage.[4] But, where notes are given collaterally with a mortgage to secure the same debt, any words expressing an intention that the notes are not to merge in the mortgage security will prevent them being controlled by the terms of the mortgage.

Where a mortgage is payable by instalments, the clause should read that the whole sum is to become due on default of any one payment.

The mortgagee is not obliged to pursue his remedies on default being made, and a delay to enforce payment is not

[1] See *McMartin* v. *McDougall*, 10 U. C. R. 399.
[2] *Herman* on Chattel Mortgages, 398.
[3] *Ing* v. *Cromwell*, 4 Md. 31.
[4] *Herman* on Chattel Mortgages, 399; *Muzzy* v. *Knight*, 8 Kans. 576.

fraudulent.[1] The time of payment limited in a mortgage, even where it is under seal, has been held to be capable of extension by parol, and the condition saved until the expiration of the extended time.[2] Payment, whether made after default or before maturity, discharges the mortgage, and the property then revests in the mortgagor without redelivery, or re-sale, or the cancellation of the mortgage.[3] As the debt is the test of a mortgage, it may exist even after the mortgage is discharged; the debt exists until it is paid, but, if extinguished in any way, the mortgage is at an end. The debt is the essential part of the transaction[4]: the mortgage is an accident of it.

A debt can exist, or be made to continue as a debt, either by parol, in writing, or by a sealed instrument, and is not barred as between the parties in the latter case for twenty years. Can a debtor tie up his property for that period by a chattel mortgage, securing such debt under our Revised Statute? This was, in reality, the principle involved in the case of *O'Neill* v. *Small*,[5] the decision in which has surprised the profession not a little.

[1] *Davis* v. *Evans*, 5 Ired. 525.

[2] *Flanders* v. *Barstow*, 18 Me. 357.

[3] *Parks* v. *Hall*, 2 Pick. 206.

[4] There may be a present debt payable at a future day. *Farlinger* v. *McDonald*, 45 Q. B. 233.

[5] 15 C. L. J. 114, decided by His Honour Judge Gowan. In that case the debt was payable by instalments, some of them not due for four years from the date of the mortgage and the conveyance required to be renewed four times in contemplation, in order to be a complete security. The writer took the objection at the trial that it would be a fraud on the Act to allow such a proceeding; that a renewal could not be anticipated, even for one day, prior to the last thirty days of the first year; and that the policy of the Act was to have payment made within the year. In the section relating to promissory notes and future advances, where the transaction was likely to be extended over a considerable period, the Act restricted it to one year; so, when the debt was a present one, the case was *à fortiori*. The learned Judge took ample time to consider this case, and decided on the grounds taken at the trial and in term, and every opportunity was afforded to have the case stated by him for the Court of Appeal, authoritatively decided, but nothing came of it. Several County Judges have refused to follow it, and the profession have, very generally, been unwilling to believe such to be the true construction of the policy of the Act. It is said also, that the present Chief Justice of Ontario, sitting as Chancellor, over-ruled it; but the decision is not to be found in the reports. The writer has seen or heard nothing, since the judgment of Judge Gowan, to change his views on the subject. Where neither the interest nor principal is due within the year, it would seem to be difficult for the mortgagee

Apart from whatever may be the law on the limit of the time of re-payment, it would be extremely injudicious to have the term extend beyond a year—the debt should be co-extensive with the security, which, for many purposes, must be an *annual* one; and if any slip were made as to the renewal, an intervening execution creditor would cut out the mortgagee. Where an entirely new mortgage must be taken, the difference is very material from renewing an old one.

The preservation of the property while in the possession of the former owner or mortgagor, is a very important part to consider. Whilst the registration of a valid conveyance will protect the mortgagee or purchaser against the creditors or other purchasers or mortgagees of the same property, it is no protection against the acts of the vendor or mortgagor. He may dissipate it, or allow it to become useless or worthless; may put it out of his possession or protection, or may fail to take the necessary precautions to have it insured. To provide against these, especially in a mortgage, is of great importance.

It usually happens that a person who gives a bill of sale or chattel mortgage is a tenant, and so the goods mortgaged may be seized for non-payment of rent. No provision can be made against this under our law as it now stands; but an agreement might be entered into with the landlord that he must not permit the rent to run in arrear, or that if he does so, then he shall have priority over the mortgagee to the extent of one payment only. If the landlord will not do this, then the time of re-payment in the mortgage should be made about ten days or so before the rent falls in arrear; and then if the mortgagee has the

to swear to "a full statement of the amount *still due* for principal and interest thereon, and of all payments made on account thereof;" the renewal apparently supposes the debt overdue. If A. owes B. a sum of money due on a bond, payable, say in sixteen years, ought this to be capable of being secured by a chattel mortgage? If an execution creditor of A.'s sold his equity of redemption, what value would it be till the mortgagee's debt were due, and he be forced to take his money? And how could the mortgagee make on oath at the end of each year, that there was *still due* to him a certain sum, when in fact nothing was due or owing him? It must assuredly be a present debt, payable at a future day. *Farlinger* v. *McDonald*, *supra*. The revised statute does not concern the immediate parties.

property sold and off the premises before the landlord can distrain, he is protected. However hard this may be on the landlord, it is not so bad as allowing the rent to accumulate so as to defeat the mortgagee.

The distress authorized to be made for non-payment of taxes, etc., can not be met exactly in this way, and the mortgagee may frequently reckon on having to advance them.

The clause as to insurance should not be forgotten, and the amount placed somewhat in advance of the loan or interest of the new owner. The insurance should be effected before the conveyances are delivered; for if the contract were complete, the loss would fall on the purchaser if the premises were burnt down. In the same way, if the mortgagee's money was paid over, and a loss to happen, his security would be gone, except whatever the mortgagor's covenant may be worth—and, generally, such covenant is of no value. The purchaser or mortgagee should see, not only that the goods and chattels are insured, but that they are kept insured.

As to removal of the goods, a clause is always inserted, that they are not to be removed without the consent of the purchaser or mortgagee. This clause should confine them to the premises on which the goods and chattels are situate, and not merely the street or farm, as the latter has given rise to difficulties.

No provision can be made ordinarily to prevent a dishonest vendor or mortgagor, who retains the goods in his possession, from carrying them away under cover of darkness, or in any other secret way, where the party entitled is not made aware of such fraudulent removal.

As to the dissipation or deterioration in value of the goods, unless with a special clause, there is no remedy therefor; and a mortgagee may be helpless to prevent the entire destruction of his security, or what he fancies his security, without being able to arrest it.

As was said in a former chapter, the personal covenant in a land mortgage is always of considerable value, and

should not be neglected; in the case of a chattel mortgage, the personal covenant is not regarded at all; but what is of consequence, is the personal character of the vendor or mortgagor, and his desire to make the most of his property by guarding it and preserving it as far as possible.

3. Form of the Conveyance. The requisites of a conveyance, under the Act, may be dismissed without any lengthy remarks.

It requires, of course, *parties* competent to enter into a contract; *proper conveying words*; the *consideration* or *debt*; and, where necessary, the intention of the parties to be expressed in *recitals*; a *description* of the goods and chattels, to satisfy the Act; *execution* of the conveyance, though it need not be under seal; necessary *affidavits*; *delivery* of the instrument; and, *registration* in the proper office, within five days after execution. The parts, peculiar to a mortgage, such as the *repayment* clause, the *covenants* and *provisos*, and the *annual renewal*, while the debt is unpaid, have been referred to before.

The conveying words, generally used, are "grant, bargain, sell, and assign;" but any words going to shew that an absolute or conditional sale was intended, are sufficient.

Recitals are used under the 6th section, to set out the nature of the agreement for future advances; but the fact of the agreement may appear in any other sufficient way. Great care must be used in setting out the agreement, so that it corresponds with the consideration, as stated.

The description of the goods and chattels, in the conveyance, becomes, at times, a very embarrassing matter.

Where they are of such a kind, that a specific description can be given, then such description should never be omitted.

The statute (sec. 23) requires "such sufficient and full description thereof, that the same may be thereby readily and easily known and distinguished." Without reference to the cases that abound in the reports on the meaning of this section, it is clear that according to the statute, the goods and chattels must be described so fully and sufficiently that a bailiff, with the conveyance or inven-

tory in his hand, could identify them. The statute expects that this must be capable of being done "readily and easily;" but it is not necessary that a deed should contain all that is required to enable a person to distinguish the articles of property by merely casting his eye upon them.[1] Where a minute description is impossible, general words are sometimes given effect to[2]; but, as a rule, general words are insufficient. Where, therefore, the description was only "all and singular my stock-in-trade, chattels, debts, etc.," or, "all my personal estate and effects whatsoever, and wheresoever,[3]" or, "all my stock-in-trade, goods, wares, and merchandise, in my store, situate at, etc,[4]" it could scarcely be said to be sufficiently specific.

There is no difficulty in stating the precise locality, and this should never be omitted, although it is sometimes assumed to refer to the parties' residence.[5]

Property described as chattels, simply or as a class, cannot ordinarily be identified, without correct locality, and so to describe a chattel as "one single buggy,[6]" or "one sorrel horse,[7]" or "two sets of black-smithing and one set of waggon-maker's tools, complete,[8]" without adding the locality, is objectionable. Some kinds of specific chattels, such as "one omnibus,[9]" or "one stumping machine,[10]" may, from their importance, or easy identification, be held to be sufficiently described as such.

But, where the locality is correctly set out, general words, describing the stock-in-trade, as of a particular business, or of a certain character, such as household furniture, in as definite a manner as it is possible to make the des-

[1] *Holt* v. *Carmichael*, 2 Ont. App. 639.
[2] *Harris* v. *Commercial Bank*, 16 U. C. R. 437.
[3] *Howell* v. *McFarlane*, 16 U. C. R. 469.
[4] *Hutchison* v. *Roberts*, 7 C. P. 470.
[5] *Fraser* v. *The Bank of Toronto*, 19 U. C. R. 381.
[6] *Holt* v. *Carmichael*, 2 Ont. App. 639.
[7] *Montgomery* v. *Wright*, 8 Mich. 143.
[8] *Mason* v. *Macdonald*, 25 C. P. 435.
[9] *Mills* v. *King*, 14 C. P. 223.
[10] *Bertram* v. *Pendry*, 27 U. C. R. 377.

cription, may be found to be sufficient[1]; but such general phrases as "stock-in-trade," "all my personal estate," "all my goods," are of themselves insufficient.

In the United States, parol evidence is generally admitted to identify the property; but the conveyance, under our statute, must contain within itself the means of identifying it. The latest authority, on chattel mortgages, lays down the doctrine that growing crops can only be identified by parol evidence, and that the same principle applies to lumber cut from saw logs.[2] The question of after acquired property has been referred to in this chapter, *supra*.

4. Rights of the Parties. When there is a redemise clause in the mortgage, the mortgagee cannot take possession until default—until his debt is due. If there is no redemise clause, he is entitled to possession on the execution of the conveyance[3]; but where the goods are taken by a third person as an execution creditor, the mortgagee is then unable to require possession. If the goods are bailed before the mortgage, it has been held that the mortgagee can recover from the bailee.

After default, the mortgagee may sell the goods or foreclose them. He must not sell more than sufficient to pay his debt, and must take the usual precautions of a trustee for sale. He will not be allowed a benefit of a sale made by him where he himself was purchaser, and he must follow strictly the terms of his mortgage, otherwise he may be let in for damages; but he is not obliged to act immediately on default being made. He can assign the mortgage debt, or part of it, and the security with it, so as to give his assignee, or any subsequent assignee, rights co-extensive with his own; and he cannot affect such assignee's rights after assignment. If he goes in possession, he must act as

[1] *Re Thirkell Perrin* v. *Wood*, 21 Chy. 492; *Wilson* v. *Kerr*, 18 U. C. R. 470.

[2] Jones on Chattel Mortgages, citing *White* v. *Brown*, 12 U. C. R. 477.

[3] The writer entirely agrees with the dissenting judgment of Mr. Justice Gwynne in *Macaulay* v. *Allen*, 20 C. P. 407, and with the cogent and learned argument of Mr. *Herman* that this should not be the law. See *Keech* v. *Hall*, 1 Sm. L. cases, 523 (notes), as to the law in this matter.

a prudent owner, though he is not owner in reality, and must bear any loss accruing to such property while he is in possession. He must comply with the statutory regulations as to conveyance, affidavits, filing, etc., so far as creditors, or subsequent purchasers, or mortgagees in good faith, are concerned; but the mortgagor or other person, except those referred to, cannot take objection to a want of compliance with the statute.

He can insure the property, and has an insurable interest thereon to the extent of his loan, and up to the time the debt is paid; but, in the event of a loss, cannot recover insurance money effected by the mortgagor on his own interest, unless the mortgagor assigned it to him.

When the debt is paid off he must discharge the mortgage on a proper discharge being tendered to him for that purpose.

Where there is a redemise clause, as has been mentioned, the mortgagor is entitled to possession until default; and he cannot be turned out on default until a reasonable time after a demand or notice has been served on him.

As to the power of a mortgagor to sell or mortgage his interest in the property, there would seem to be some conflict of opinion. The American authorities say that there is nothing fraudulent or wrong in a mortgagor disposing of the mortgaged property, subject to the lien of the mortgage.[1] On the other hand, it is laid down that if he attempts to sell his interest absolutely, this determines his possession, and the mortgagee can recover at once against the purchaser.[2] This case, if followed now, would entail serious loss on a mortgagor. The American authorities cited must refer to the cases where there is no change of possession. In every well-drawn mortgage there should be a proviso for possession, where the mortgagor sells, or attempts to sell the goods outside of the provisions of the Revised Statute—that is, where there is a delivery and change of possession.

[1] *Herman* on Chattel Mortgages, 473, and *Hodson* v. *Treat*, 7 Wis. 263.

[2] *Loeschman* v. *Machin*, 2 Stark, N. P. C. 311; *Cooper* v. *Willomatt*, 1 C. B. 672.

Mr. *Herman*, on Chattel Mortgages, p. 473, also cites authority to show that a mortgagor has no right to effect a second mortgage on the property to the prejudice of the mortgagee's rights; and if he mortgage the entire property to another without notice of the prior mortgage, and permits the subsequent mortgagee to take possession, such mortgagor is liable to the first mortgagee for trover for a tortious conversion.

Where a first mortgage is duly registered, it must be held to be notice to a subsequent purchaser or mortgagee, who can claim no more than the mortgagor could give them. Second mortgages on chattel property are quite common in this Province, and the Registration Office affords information to a second mortgagee as to the condition and title of the property in question.

The mortgagor can always redeem the property till foreclosure. When the mortgagee's debt is satisfied his title ceases, and the debtor may at any time after default, and before sale or foreclosure, extinguish the charge, by paying the debt, interest, etc. The mortgagor is, in effect, the owner until sale or foreclosure, subject to the charge; and the title of the mortgagee does not seem to be absolute on default being made, and his right to redemption cannot be waived.

He has an insurable interest in the goods mortgaged to their full value, and an insurance effected by him cannot *ipso facto* be claimed by the mortgagee; but where there is an agreement to insure, or the insurance money is assigned to the mortgagee, then the latter is entitled to the money.

Where a mortgagee has taken possession, or has sold the property mortgaged, he must account for the proceeds to the mortgagor.

On payment of the mortgage debt to the mortgagee, or any assignee, the mortgagor is entitled to have a statutory discharge of his mortgage executed by the party entitled to receive the money.

VIII. SALES AND MORTGAGES OF VESSELS.

Wherever there is more than one owner in a ship or vessel, the right or property in the vessel must be divided into shares, and the number of shares held by each owner registered. There cannot be more than thirty-two *legal* owners, but a firm or partnership may hold one share without regard to the number of members in the firm. When the necessary particulars as to ownership, build and description of the vessel have been duly declared and registered, a certificate of such registry, embodying such particulars, is to be granted; and on the back of this certificate is to be endorsed the names of the owners and the number of shares they hold. Copies of the declaration of ownership, taken from the registers, or certified to be copies by persons having charge of the originals, are *prima facie* evidence of all matters contained or recited in the registers, or endorsed in the certificates.

The certificate of registry is, therefore, evidence of the ownership and right of property of every registered vessel, and should be produced to every intended purchaser of the vessel, or any share or shares therein, and should be compared with the registers. When the vendor is not the builder, then the title should be traced by the production of the bill of sale or transfer, under which he claims, as well as the certificate of registry. Where the certificate of registry has been lost, mislaid or destroyed, no new certificate of registry is to be issued under our Act[1] amending *The Merchant Shipping Act*, 1854, without proof on both in regard to the loss, etc., of the former certificate.

A ship must be registered in her true name, and such name cannot be changed except by the previous permission of the Governor-in-Council.[2]

A ship, under the Act 36 Vic., cap. 128, D., includes every description of vessel used in navigation not propelled

[1] 36 Vic., cap. 128, sec. 15 D.
[2] *Ibid*, sec. 22.

by oars[1]; but the provisions as to measurement and registration do not apply to—

1. Ships having a whole or fixed deck, not propelled wholly or in part by steam, and not exceeding ten tons burthen.

2. Ships not propelled wholly or in part by steam, and not having a whole or fixed deck, whatever their burthen.[2]

Ships entitled to be registered as British ships in Canada, under the Act, are entered in the office of the collector or other principal officer of customs, as appointed by the Governor-in-Council, and every person is entitled to have access to the register of any ship registered in Canada at the port of registry of such ship.[3]

The Merchant Shipping Act of 1854,[4] which is not repealed by our Dominion Act, except as to inconsistent provisions, makes provision for the sale or transfer of a ship by bill of sale.[5] It must recite such description of the ship as is contained in the certificate of the surveyor, or other description necessary to identify the ship to the satisfaction of the collector of customs or other registrar. The form given in the Act must be followed; and, immediately on the execution of the instrument, the vendee becomes entitled to all the benefits and liabilities of ownership. It is his duty to see that the bill of sale is registered.[6] On a sale by a sheriff on an execution, however, it was held not necessary that the transfer be registered, or that it should recite the certificate of ownership.[6]

Where a vessel does not come within the class requiring registration, a written instrument is not necessary to pass the property therein.[7] But it is apprehended this refers only to the immediate parties, as in the case of any other chattel; and so as to creditors and subsequent purchasers

[1] 36 Vic., cap. 128, sec. 4.
[2] *Ibid*, sec. 7.
[3] *Ibid*, sec. 11-17.
[4] 17 & 18 Vic., cap. 104 (Imp.) See also C. S. C. cap. 41.
[5] *The Spirit of the Ocean*, 34 L. J. Ad. 74.
[6] *Smith* v. *Brown*, 14 U. C. R. 9.
[7] *Chisholm* v. *Potter*, 11 C. P. 165.

in good faith, there would seem to be no reason why the bill of sale of an unregistered vessel should not come within the terms of R. S. O., cap. 119. It is to be noted that sec. 26 of that Act says nothing whatever as to *sales* of vessels.[1]

The Revised Statute of Ontario, cap. 119, does not apply to mortgages of vessels registered under the provisions of any Act on that behalf.

36 Vic., cap. 128, D., is the Act under which provision is made for the registration of mortgages of vessels.

Where a ship is about to be built, or is being built, it may be recorded under a temporary name, at the nearest port; and the builder, having furnished the registrar of shipping with a description of the ship and a statement of the intended port of registry, and other requirements, the ship can then be mortgaged under the form prescribed by the Act, and duly entered in the record book.[2]

There may be several mortgages, which are to be recorded as produced to the registrar (sec. 38), and the mortgagees rank according to the dates of their mortgages, notwithstanding any express, implied or constructive notice (sec. 40). When payment is made by the mortgagor, who is deemed to be the owner (sec. 41), the mortgage can be discharged (sec. 39). The mortgagee has power of sale, and is not affected by the insolvency of his mortgagor.

Any recorded mortgage can be transferred to any person by an assignment in the form given by the Act. When the ship is built, all the recorded mortgages then undischarged are registered in the register book.

These regulations as to mortgages, it will be seen, apply to mortgages of ships while in course of construction. The Act of 1854 or the C. S. C., cap. 41, must be looked at in reference to other mortgages thereon.

[1] See *Herman* on Chattel Mortgages, 71, and *Leland* v. *The Medora*, 2 W. & M. 92.

[2] 36 Vic., cap. 128, sec. 36-37 D.

The Imperial Act of 1854 was amended by an Act passed in 25 & 26, Vic., cap. 63, giving in effect a power to mortgage vessels generally. This power was doubted by the Court of Chancery as existing under the prior Act. The late Act recognized equities as enforceable against owners and mortgagees of ships, in respect of their interest therein, in the same manner as equities may be enforced against them, in respect of any other personal property.[1]

The amended Act must be in force in Canada. In the 2nd sec. of our Act of 1873, referred to, it is recited: "And whereas, by the five hundred and forty-seventh section of *The Merchant Shipping Act*, 1854, it was enacted and provided that the legislative authority of any British possession shall have power by any Act or Ordinance, confirmed by Her Majesty in Council, to repeal, wholly or in part, any provision of the said Act relating to ships registered in such possession, so much of the said Act, and of any other Act, amending the said Act, and forming part of the same, as is inconsistent with this Act, is hereby repealed, so far as relates to ships registered in Canada."

IX. LEASES OF GOODS AND CHATTELS.

Goods and chattels may be let for years, though the terms landlord and tenant are inapplicable to such letting, as the interest of the lessee therein differs from the interest which he has in lands, as do also the duties of the lessor.

A lease may be made of stock, or of live cattle, so as to convey the property therein for the specified term; and during that time the lessee, though he is entitled to the young, cannot kill or give any of them away.[2] During the term, the lessor has nothing to do with them, and he has no reversion therein, as they may not outlive the term; but if they die, he is not obliged to replace them. The lessor cannot distrain, unless the goods and chattels are mixed up with land, as in the case of a house and furniture.[3]

[1] *Ward* v. *Beck*, 32 L. J. C. P. 113. See *Addison* on Contracts, as to the provisions of 25 & 26 Vic., cap. 63, in this behalf.

[2] Litt. s. 71, and *Doe d. Griffith* v. *Lloyd*, 3 Esp. 78.

[3] *Newman* v. *Anderton*, 2 B. & P. 224.

If there is an execution against the owner, the goods leased cannot be taken, if they are in the possession of the lessee[1]; but if the execution is against the tenant, the lessor would seem to have no remedy. However, if the interest of the tenant is conditioned to cease on the goods being taken in execution, the owner may, it seems, recover them, even from the sheriff.[2]

In the recent case of *Oliver* v. *Newhouse*,[3] the authorities, in regard to a lease, or a bailment of chattels are considered, and the Court of Common Pleas was apparently divided upon the inference to be drawn from undisputed facts, in order to shew a sale or a lease. Mr. Justice Osler says: "If the identical articles were to be returned, the transaction would be a lease, but if they were not *necessarily* to be returned, but only in the same kind, and to the same value—and that is, I understand, the effect of the evidence—it would, as the authorities I have referred to shew, be a sale." Chief Justice Wilson, in the same case, says: "I do not understand the law to be, nor that it is contended to be, that, upon the demise of personal chattels, the lessee may sell or convert them as he pleases, or that he may keep them and substitute others for them, or pay their price in money, or that the absolute property in them can be sold for his debts. The lessor has only parted with a limited interest as to time in them, and he is entitled, at the end of that term, to the re-delivery of them.[4]"

[1] *Izod* v. *Lamb*, 1 Cr. & J. 35.

[2] *Berry* v. *Heard*, Cr. Car. 327; Bythewood, Leases, 548-551.

[3] 32 U. C. C. P. 90. This case is in appeal.

[4] *Gordon* v. *Harper*, 7 T. R. 9; *Fenn* v. *Bittlestone*, 7 Ex. 152. The learned Chief Justice of the Common Pleas Division refers to the law generally in a lease of chattels, citing other authorities than those referred to. His judgment came to hand while this chapter was being set up.

CHAPTER IX.

WILLS.

I. Preliminary.
II. Soundness of Mind.
III. Undue Influence.
IV. Other Disabilities.
V. The Wills' Act of Ontario.
VI. Instructions for drawing a Will.
VII. Form, etc., of the Instrument.
VIII. Execution:
1. *Signature.*
2. *Witnesses, etc.*
IX. Revocation.
X. Registration.
XI. Probate.

I. PRELIMINARY.

A will is not regarded by professional men as a document that anybody can draw correctly. From the proportion of cases arising out of wills, it may be almost said in this country, as it has been said in England, that probably three-fourths of the litigation is in reference to the construction or genuineness of wills. This has led some jurists to question the wisdom of allowing any person to control his property after his death; and to hold up for imitation the times anterior to the Tudor period, when the disposition of a man's property depended on his dealings with it in his lifetime. Others, with more reason, applaud the French system, which, though it allows a testamentary disposition, still holds it within certain limits—viz., that the property should not be willed outside the family, etc. This will reminds the student of the peculiar principles

involved in the Roman law,[1] and which are lost sight of in the sweeping powers allowed by the laws of England and of this Province. The law here allows to the subject the liberty to do what he likes with his own, whether he absolutely disposes of it during life or by will. The testator, whether as the result of mature deliberation or whim, or of a sudden fit of passion, can generally disinherit his own family, giving his property to a stranger, and leaving his own offspring without even the customary shilling.[2] An exception to this absolute power of disposition may be found in the case of a married woman, whose right to devise her property outside of her own family, or favour one child to the exclusion of the others, is still questioned.[3]

While this wide liberty is allowed, the law must be satisfied that the testator had sufficient capacity to deal with the matters embraced in the will, and that he was not unduly influenced in the disposition made; and also that he made his will openly, in the presence of at least two witnesses.

The practitioner who is called upon to prepare a will, knows, therefore, beforehand, that there is always a possibility of future litigation, no matter how apparently the will is made toward the testator's relatives. If the property does not go to his relatives, then there is a common cause, from their point of view, against the obnoxious recipient. If it be divided, no matter how equitably, among themselves, the recipients of the smaller shares make battle against their more fortunate brethren, with an acrimoniousness if anything more bitter than against a stranger. So true it is, that friends or relatives are the most irreconcilable of litigants—the most exacting of each other, and the least yielding of themselves.

[1] The "inofficious" will of the Roman law was one where the natural affection and the claims of near relationship were disregarded.

[2] See *Parkhurst* v. *Roy*, where a testator in Ontario devised some of his property to the State of Vermont, and the devise was upheld as to the property not within the Mortmain Acts. 27 Chy. 361. This case is now in appeal.

[3] *Munro* v. *Smart*, 4 Ont. App. 449.

With such prospects in view, there should, of course, be great caution used, and all possible steps taken to effectuate, in a way likely to stand, the intentions of the expected testator.

II. SOUNDNESS OF MIND.

One of the common objections to a will now-a-days—an objection so common in the United States as to make it expected—is, that the deceased was not of sound mind—that he was insane—that he had no disposing capacity. In regard to this, it must be stated that a legal practitioner, unless he has made the matter a special study, knows as little about the medical symptoms or tests of insanity as any other unskilled person. His education, generally, no more fits him to be a judge of sanity than to be a judge of any other normal condition of the human body. He views insanity just as any other person who is not a medical man—by the acts and conduct of the party affected. Some medical practitioners take a totally different view. With such it is a disease; and, though they may judge of the disease by the acts of their patient, these form only one series of facts in their diagnosis. They conclude, when the mind is diseased, each act as flowing from a diseased mind is an insane act.

Where a man's sanity is questioned, a lawyer can but carefully note what he sees and hears; but he is not to settle the case in his own judgment so as to refuse to draw the will. A case recently happened where a lawyer refused to draw a will for the deceased, and the Court was of opinion that it would have been better had he done so; and, if the testator were found to be insane, the will could have been set aside. This would entail less injustice than not permitting a man, actually sane, though reputed otherwise, from disposing of his property as he thought fit. It may well happen, that a man's household would be divided as to his sanity, and that those who were well remembered in his will would assert his sanity, and those not so fortunate would be willing to swear that they always knew he was

not right in his mind; yet, a lawyer called in, is surely not to decide the question, and perhaps do a positive wrong.[1]

It may be well for both solicitor and witnesses to attest the fact in some formal way when they have grave doubts as to the testamentary capacity of the deceased.

The legal adviser will always be one of the main witnesses in the case, and so it behooves him to make the most of his visits in estimating how far his client may have the necessary *mens disponendi*. The clearness with which he may know of his relatives, and the value of his own property, may be important *data* in the absence of any recollection upon conversations outside of the professional visit; and therefore, it is well that the professional man should take down, in the language of the deceased, all that he gives him as to his property and the beneficiaries, and carefully preserve the memorandum, so as thereby to aid in the consideration of the question, should it afterwards be raised, of the mental capacity of his client. Any extraordinary or rather unexpected devise or bequest should be discussed, and the reasons noted separately, to be weighed according to their adequacy. Any omission should be discussed also. It may be mentioned, that to answer familiar and usual questions, is not alone sufficient evidence of the necessary will-making capacity. The person ought to have a disposing memory, so as to be able to recollect the value and amount of his property, and those who should primarily be the recipients of his bounty, and thus be entitled to make a disposition of his estate with understanding and reason.[2] A man confined in an asylum may be, and, indeed, has been, declared capable of making a will,[3] judging by the reasonableness of its provisions, and the apparent absence, at the time of the making of the will, of the delusion, the presence of which necessitated his confinement in the asylum.

[1] Brown on Insanity, p. 126.

[2] Marquess of Winchester case, 6 Rep. 23 a.

[3] Per Lord Eldon, *McAdam* v. *Walter* 1 Dow, 178; *Cartwright* v. *Cartwright*, Phillim, 90.

A will made in a *lucid interval* is as valid as if the testator were never insane; but the difficulty is to prove that the mind was sufficiently restored. It need not be completely in its former condition.

Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of a debt by a testator,[1] and would not affect his will, even though he was so extremely weak in body and mind that his directions were given at intervals, and were difficult to understand, and the will probably not containing *all* his intentions.[2] And the English doctrine, that where the testator appreciated clearly the value and extent of his property and the objects of his bounty, the will should be upheld, has been followed in this Province.[3]

We have many definitions of a sound or disposing mind. Some of them may be thus summed up. A man must understand that he has a house, or lands, or money, and something about it; that he has the power of disposing of these by will, which is an instrument of the law, by which the wishes of testators are given effect to after their death; he must know that he has or has not relatives; he must, if he has relatives, know who they are, and know and remember some of his relations to them, and of their claims upon his memory, affection and bounty.[4] The mental health may be slightly impaired, the haleness and strength of middle age may be somewhat diminished, and old age may have caused a certain dilapidation of the mental structure; yet, if the individual be able to comprehend the business in hand, and the possible objects of his bounty, and retains these in his mind sufficiently to pass a sound and natural judgment on them, he is able to make a will.[5] The law has not said that no man not in the prime of life shall not make a will; it has not said no one whose mind has suffered any diminution of strength shall not make a will; it has not said no

[1] *Emes* v. *Emes*, 11 Chy. 325.
[2] *Martin* v. *Martin*, 15 Chy. 586.
[3] *Wilson* v. *Wilson*, 22 Chy. 39; *Ingoldsby* v. *Ingoldsby*, 20 Chy. 131.
[4] Brown on Insanity, 77.
[5] *Ibid*, 80.

one who entertains wrong-headed notions, capricious whims, and stupid prejudices, and the like, shall not make a will. If he has enough of mind to do this thing rationally and willingly, he has a sound mind.[1]

Although it is said, at times, that it requires the highest degree of capacity to make a will, yet generally, the authorities say that it does not require any very great amount of capacity to make a will.[2]

It seems now pretty firmly established that insanity or delusion, unconnected with the objects of testamentary disposition, and which did not actually affect that instrument, will not invalidate it.[3] It has been held that a man might be insane, and yet possess a disposing mind, and if the delusions, though still existing, had not affected the disposition, then it should stand.[4]

Lord Kenyon says, that a man must have that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it.[5]

Notwithstanding these definitions, there are many cases in which testators appear not to have had the requisites called for by them, and yet the wills propounded have been allowed to stand. As striking examples of such cases, see *Martin* v. *Martin*, 12 Gr. 500; 15 Gr. 586; *Menzies* v. *White*, 9 Chy. 574; *Deare* v. *Elwyn*, Ec. & Mar. 342; *Thompson* v. *Torrance*, 28 Chy. 253.

III. UNDUE INFLUENCE.

Another great source of litigation in wills is that, although the deceased possessed the *mens disponendi*, he was not a free agent; that he was under some undue influence, which prevented the disposition of his property from being virtu-

[1] Brown on Insanity, 82.
[2] *Ibid*, 247.
[3] *Ibid*, 252.
[4] *Banks* v. *Goodfellow*, 5 L. R. Q. B. 549.
[5] *Greenwood* v. *Greenwood*, 3 Curt App. 230.

ally his own act. The confidential relationships that generally give rise to this position, are those of solicitor and client, guardian and ward, confessor and penitent, etc.

In such cases as the above, where the *onus* of proving the fairness and propriety of the transaction lies on the party benefitted, the rule, as laid down in the well-known case of *Huguenin* v. *Basely*,[1] still correctly presents the law on this point. Where any confidential relationship exists, and the party in whom it is reposed makes use of it to obtain an advantage to himself, at the expense of the party confiding, he shall never be allowed to retain any such advantage, however unimpeachable such transaction would have been if no such relationship had existed. Outside of the relationship existing in such cases as the above, there may, of course, be undue influence.

But all influences are not unlawful. Persuasion, appeals to the affections, or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like; these are all legitimate, and may be fairly used on a testator. The testator may be led, but not driven, and his will must be the offspring of his own volition, and not the record of that of some one else.[2] The influence must not, however, amount to a control.[3]

If a testator be constrained to make a will by fear, it cannot stand,[4] as the fear of death, or of bodily hurt, or imprisonment, or loss of one's goods, or the like; and a will obtained by fraud is no will.[5]

Unless the influence amounts to a control, so that it could not be said that the will was the will of the person assumed to have made it, this is not sufficient to invalidate it.[6]

A will may be procured by interrogation. It need not necessarily originate with the testator; but the deceased

[1] 14 Ves. 273.
[2] *Sefton* v. *Hopwood*, 1 F. & F. 578.
[3] *Waterhouse* v. *Lee*, 10 Chy. 176.
[4] Godolp, pt. 3, C. 25, S. 8.
[5] *Boys* v. *Rossborough*, 6 H. L. C. 2.
[6] *Handley* v. *Stacey*, 1 F. & F. 574.

must completely understand, adopt and sanction the disposition proposed to him.[1] He may even be unprepared to make a will, and have no intention of doing so.

But, in such cases, the Court will scrutinize with great care, the alleged disposition, and require convincing proof that, although it be a will by interrogation, it embodies the wishes of the testator, and that he knowingly assented to this paper propounded as his will.

After these remarks, it will appear at once how unfortunate it would be for any relationship to exist between the testator and the person drawing the will, where the latter is to reap any benefit under it. Doctors and clergymen are frequently called upon to draw wills, where the parties desiring them are *in extremis*, and what they do as a work of charity and kindness, is not to be harshly dealt with. But it should be remembered that when a man, capable of disposing of his property by will, wishes to do so, the person who undertakes that task is only his amanuensis for the time being, and that whether he be only capable of writing the testator's words down, or is the most learned in the law of Her Majesty's Counsel, if the result does not embody the intention of the deceased, and his intention only, it is not his will. He must be capable of acting, and free to act. The limit of suggestions must be left to the common sense of unprofessional persons whose duty it may be, in extreme cases, to draw up the *will* of a fellow-being—not to impose their own views on a dying man, and then misname the result his will.

IV. OTHER DISABILITIES.

A testator may have outlived his understanding, but mere age or weakness of intellect is not sufficient to avoid a will; but imbecility produced by age or sickness, of which the devisee has taken advantage, will be fatal.[2]

The only disability created by statute appears to be that of persons under the age of twenty-one years.

[1] *Thompson* v. *Torrance*, 28 Chy. 253. See also *Bell* v. *Lee*, 28 Chy. 150.
[2] 1 Wms. on Ex'ors. 36.

A married woman is included in the definition of "person" or "testator" in the Revised Statute Ontario, cap. 106, but it will be seen that it is doubtful if she has any further power, as to her separate estate, than under the Act of 1859. By it she could make any devise or bequest of her separate property to or among her child or children, issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried. The Revised Statute should be amended as to wills since January 1st, 1874, setting the doubt in question at rest.

A deaf-mute may make a will; but a person deaf, blind and dumb is legally an idiot, and his testament, if made, would be void. Blind persons are not incapable, nor are deafness and dumbness absolute incapabilities.[1] Intoxication, short of producing oblivion, will not incapacitate—it must disorder the faculties and pervert the judgment.[2]

Old age is of itself no incapacity, but if a person becomes a child again, through want of understanding, he is incapable[3]; and extreme old age raises a doubt of capacity.[4]

It is said that traitors and felons, in England, cannot make a will of personal estate; but a felon may dispose, by will, of real estate, where there is no attainder.[5] No case seems to have arisen in this Province.

V. THE WILLS ACT OF ONTARIO.

The Revised Statute, cap. 106, of Ontario, contains the statutory enactments relating to wills of real and personal property.

The word Will is extended to a testament and to a codicil, and to an appointment by will, or by writing in the nature of a will in exercise of a power, and also to a disposition by

[1] See cases on these classes of disability, Walkem on Wills, page 49.
[2] *Peck* v. *Carey*, 29 N. Y. R. 9.
[3] 1 Wms. on Ex'ors. 37.
[4] *Kindleside* v. *Harrison*, 2 Phill. 461, 462.
[5] Jarman on Wills, 38.

will and testament, or devise of the custody and tuition of any child under 12, Car. II., cap. 24, and to any other testamentary disposition.[1]

Parties capable of making a will include married women[2]; but it is doubtful, under the decisions, if she can devise her property away from her own children.[3]

No will made by any person under the age of twenty-one years shall be valid[4]; but, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the passing of the Act.[5]

The disposing power of a person capable of making a will, extends to all real estate and personal estate which he may be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heir-at-law; and this power extends to estates *pour autre vie*, and to all contingent executory or future interests in real or personal estate, and to all rights of entry for conditions broken, and other rights of entry; and, finally, to all other real and personal estate as he may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.[6]

Every will is construed to speak and take effect immediately before the death of the testator, unless a contrary intention appears by the will.[7]

A dividing line must be drawn at the 1st of January, 1874, as to wills executed before and since that date, and, for some purposes, also on the 1st of January, 1869. Every will re-executed or re-published, or revived by any codicil

[1] R. S. O., cap. 106, sec. 9, sub-sec. 1.

[2] *Ibid*, sub-sec. 4.

[3] *Munro* v. *Smart*, 4 Ont. App. 449.

[4] R. S. O., cap. 106, sec. 11.

[5] *Ibid*, sec. 14. These persons may make a valid will without its provisions being reduced into writing. A declaration in the presence of three witnesses is all that is necessary; and if the declaration is taken down in writing, it should be in the precise words of the testator.

[6] R. S. O., cap. 106, sec. 10.

[7] *Ibid*, cap. 26.

executed since the 1st of January, 1874, is governed by the present law, and is deemed to be made at the time at which the same was so re-executed, republished, or revived.[1]

Very minute particulars are given as to execution, attestation, signature and witnessing of wills; and also as to revocation, obliteration, etc.; and the Act defines the meaning of "real estate," "personal estate," "person," "testator," and "mortgage," and the import of some other phrases in use in testamentary dispositions, to which reference will be made hereafter.

VI. INSTRUCTIONS FOR DRAWING A WILL.

When one is satisfied that the proposed testator has a mind sufficiently capable to dispose of his property, and, further, that he is free to act as he chooses, then the immediate task of conveying his wishes to paper in a legal way is commenced. In this regard the instructions of a learned writer in England will be found to be in point.[2]

"On being instructed to make a will, you should take down in writing full particulars respecting the testator's property, whether in possession, reversion, remainder or expectancy, and also the particulars of his family. After doing this, insert opposite each description of property the name and any necessary identification of the person to whom the testator intends to devise or bequeath it; and this should be continued until the whole property is disposed of."

Beyond this, and, indeed, first of all, enquiry should be made to see if the party is of sufficient age to make a will, in case, from appearances, the person may seem to be under twenty-one years of age—then an enquiry as to former wills, if any—as to whether or not the testator is a trustee, or has any power of appointment yet to be executed —what persons he proposes to appoint as executors and trustees to his will—what provision he has to make for his wife, in case he be married; and, lastly, in the event of his

[1] R. S. O. cap. 106, sec. 7.
[2] Greenwood Con. Chap. Wills.

coming into the possession of property from the wills of any relatives, to whom is he to leave property as his residuary legatee or devisee.

In the event of the testator being the father of infant children, the suggestion may be made of his power of appointing a guardian for them, explaining to him that, in the absence of his appointment, their mother is their natural guardian, but that the Surrogate Court or the High Court of Justice may, for sufficient cause, remove the guardians and appoint others in their stead.

But it will be necessary to examine the foregoing more in detail.

The requirements extracted from Mr. Greenwood's book are the least of their kind that must be obtained. The testator's real estate may be encumbered or leased, and he may have a large amount of personal property, and he is likely to have debts. Suppose that farm Whiteacre is bequeathed to the testator's son, John. Whiteacre may be heavily mortgaged, and John may die before the testator. If the personal property is to pay off the mortgage, it must be so willed, otherwise John will take his bequest *cum onere*. Suppose John die under age and without issue, what is to become of the devise? must be answered by the testator. Again, if a bequest be left the wife or a daughter, it will be frequently found that, what is set down as an estate in fee, will, in certain contingencies, be pruned down to an estate for life in their regard. After explaining to the testator that, if his daughter die under age and without issue, there will (in the absence of a residuary clause) be an intestacy as to her bequest, unless some further provision is made in that event, then a clause will be added providing for the testator's wishes. The advantages of a residuary clause are apparent from this, and no will should be without one. A bequest may be followed in a will, making provision for two or more contingencies; but, in real life, the beneficiaries may be all dead, childless and intestate, before their expected estate vested in any one of them.

Though almost every will contains a clause revoking all former wills, yet, without this, two wills, if not inconsistent,

may be read together—the latter as supplementing the former or prior ones, and, in a possible case, the testator may not wish to disturb the provisions of a former will. Wills are often deposited in the Registry Office for safe keeping, and a supplementary one may be only a sort of codicil, and to be so treated.

As to the age of a testator, the statute is express that no one under the age of twenty-one years can make a will.[1]

If it be likely that the testator is a trustee, it can do no harm to insert a devise of trust estates, as it will save great trouble and expense if it should be found requisite[2]; and if, under any former will, he had any powers of appointment by will, then the will in question should be looked into, so that the mode of appointment could be strictly followed.

In the selection of executors, the testator should be guided, not so much by his friendship with the persons he names, as by the fact that they have sound common sense, and have some business capacity. To be an executor is to assume a troublesome, and often a thankless task; and, if the boon of renunciation were not open to the public, it would be difficult, in some cases, to suggest a more refined species of courteous cruelty than to name one's enemy as an executor. What often happens, is to name two or more who do not wish to act with each other, but who would act with more agreeable representatives. It is not an easy task to select, and the testator should know that it is worth his while, and will be of advantage to his estate, to have competent persons take charge of it.

An executor, as such, has nothing to do with the real estate of his testator; and if he is invested with the power of selling, or otherwise disposing of it, he assumes the higher character and more responsible functions of a *trustee*.

Now, it will be easily seen that the qualifications necessary to fill this office are the most trustworthy that can be had. To collect what is owing to the testator, to pay his

[1] See *post*, as to Nuncupative Wills.

[2] Greenwood Con. Chap. Wills.

debts, and distribute the balance of his personal estate amongst those entitled, are the main duties of an executor. A trustee may, if he be executor as well, as is usual, have all this to do, and, in addition, husband the entire real estate as well, and so his qualifications should be such as to fit him for these duties.

Seldom more than two trustees or executors can be got to act, and it is not desirable to appoint a number, who only make expense by their renunciation.

Trustees are unnecessary, except where real or personal estate is to be sold and invested, or where the wife or children are to be maintained out of the proceeds.

The executors and trustees should, except in very large estates, be the same persons. The duties of an executor will ordinarily cease at a little over a year from the death of the testator, when he shall have collected in his testator's estate, paid the debts and the legacies. If, beyond this, annual sums are paid into his hands, in trust for persons under the will, and if he shall be called upon to sell lands and stock, and hold them to the use of other parties, he will be fulfilling the office of trustee, but these will, in no way, conflict with his previous duties as executor.

As to when trustees take the legal estate, see Prideaux on Conveyancing, 9th edition, p. 371.

Where the testator or testatrix is married, a difficulty always presents itself in providing definitely for the surviving wife or husband. If the husband leave his wife a bequest without more, she will be entitled to it as well as to her claim for dower; and upon the face of the will, the devise or bequest must be inconsistent with her claim to dower, in order to put her to her election.

Where, in general, a testator says that he wishes his property to go to his wife, he does not in the sense of its changing the course of its descent.

Where there are children, it will most frequently be found that she is to get it for her life, and after her death, to the children, and failing children, to the brothers and sisters of the testator. As soon as a husband is made

aware that an absolute devise of all his property to his wife not only gives it to his wife but to *her* heirs, in certain contingencies, then he frequently gives her a life estate, keeping the course of descent in his own family. And so, correspondingly, in the case of the wife. This would be the simplest form of will, where there are no children; but either party may wish to give a share only to the other, and if so, it must be considered whether it is to be given in lieu, or in addition to her or his right as dowress or tenant by the courtesy. The survivor is not bound to accept, under the will, such share, but may have recourse to what the law allows, if he or she thinks this would be more advantageous. They must either accept under the will, and any legally imposed restrictions therein, or disregard the will altogether. It is always well to counsel the testator or testatrix to exceed, if anything, the legal shares of his or her survivor. The liberality may repay itself.

The share of the children comes next in point of importance. In order to prevent any *lapses*, a devise or bequest to any child should, in the event of his death, be made to some one over; though a legacy to a testator's child, or other issue, does not lapse by *his* death, if he has had any issue at the testator's death; but the legacy takes effect as if he had died immediately after the death of the testator.

A testator may not know the extent of his disposing power. The test is what real and personal property will his heirs, executors or administrators be entitled to at law or in equity, at his death. This will include everything except estates held in joint-tenancy, or an estate tail, or an estate in quasi tail (that is an estate *pour autre vie* given to a man and the heirs of his body), none of which descend to the testator's heir, executor or administrator.[1] Of course, life estates, that are for the life of the testator, do not pass—they cease at his death.

A married woman, however, cannot, it seems, under the law, as explained by the decisions, devise or bequeath her

[1] Deane Con. 411.

property to one of several children, to the exclusion of the others.[1]

If the testator feels charitably disposed, he should be warned against leaving any real estate, or personalty savoring of the realty, to corporations coming within the scope of the Mortmain Acts, which are in force in this Province. It is not impossible, as we have seen, to make a valid deed of lands to such a corporation, when the terms of the Act can be complied with; but it is not easy to comply with these terms. Pure personalty can be devised to any religious corporation without any additional formality beyond such conveying words as would hold good in the case of any ordinary legatee.

Every devise of land to a corporation is void, unless such corporation is authorized to hold land in Mortmain by license from the Crown or Act of Parliament.[2] Under the provisions of 9 George II., cap. 36, every testamentary disposition of land for a charitable use is void.[3] The reader must not forget how wide a signification is given to the word charitable in these cases; if, therefore, the testator desires to benefit such corporation or bodies, it should be seen that the bequest is made expressly out of his pure personalty; and the realty, and personalty savoring of the realty, be reserved for the purposes to which it may lawfully be applied.

Two sorts of gifts the conveyancer should guard the testator against. One is those of a class that tend to create a perpetuity, as where an estate is given to a man's son, but not to be sold out of the family—to be kept in the name.

This tends to depreciate the value of the property, whilst perpetuating the name of the donor; but they frequently defeat themselves. Prohibitory clauses, if carried too far, are struck out by the Courts.

The other class is where gifts are given to the wife or relations of the testator, with obnoxious conditions. It is

[1] *Munro* v. *Smart*, 26 Chy. 31, and 4 Ont. App. 449.
[2] Jarm. on Wills, 58.
[3] *Paice* v. *The Archbishop of Canterbury*, 14 Ves. 364.

natural, perhaps, that a testator may not like to be liberal to his wife's second husband; but to cut off a daughter or son because they happen to offend some guardian's taste in the choice of a partner for life, does not receive very courteous judicial treatment. Side by side with objectionable provisions, it is usual to wish inserted a clause, prohibiting any party, claiming under the will, from disputing it[1]; but the most ingenious of clauses fails at times, and it has happened that such a prohibition, though valid, as against a daughter,[2] did not avail as against her trustee.[3] It is just possible that a perfect prohibitory clause may be made.[4]

A direction in a devise in fee simple, that the devisee "should not sell or cause to be sold the above-named lot or any part thereof, during her natural life, but that she shall be at liberty to grant it to any of her children, whoever she shall think proper," is a valid restraint upon alienation[5]; but the devisee may mortgage it.

Although this case is an instance of the difficulty that exists in construing these conditions, and of the particularity to be employed in expressing exactly what is needed, in *Smith* v. *Faught*, it may well be questioned whether the paper propounded was a will at all or not.

A devise to sons, with a direction that they must not sell or transfer the said property, without the written consent of the testator's wife during her life, held a valid restriction on alienation.[6]

If several good and bad conditions are coupled together they are all bad.[7]

As conditions attached to devises and bequests offer frequent difficulty in taking instructions for a will, the following reference to the cases on the subject may be found of use.

[1] A provision of this kind is valid, and is not contrary to public policy; *Evanturel* v. *Evanturel*, 6 L. R. P. C. 1.

[2] *Cook* v. *Turner*, 15 M. & W. 727.

[3] *Cook* v. *Turner*, 19 L. J. N. S., Chy. 81.

[4] Greenwood, 408.

[5] *Smith* v. *Faught*, 45 Q. B. 484.

[6] *Earls* v. *McAlpine*, 6 On. App. 145.

[7] *Re Babcock*, 9 Chy. 427.

It is laid down, generally, that conditions repugnant to the nature of the estate to which they are annexed, are absolutely void. And so land given in fee to be let by the devisee at a definite rent, or to cultivate in a certain manner, will be unfettered by such restrictions[1]; but a direction that the rents of existing tenants should not be raised, or that certain persons should be allowed to continue in possession, are merely exceptions or reservations. It is also useless to make a clause that the wife should not be endowed, or the husband a tenant by courtesy[2]; or that the devisee should not alien[3]; but the devisee may be restrained from aliening to any particular person, or by any particular mode of assurance,[4] or in Mortmain.[5] A restriction to alien to none but A. is void[6]; but a provision, never to sell out of the family, has been upheld, though the devisee could never make a good title to a purchaser who was a stranger in the family[7]; and where a testator died, in 1854, giving lands to his two sons, "but not to be assigned to any person, except a son of his, for the term of twenty years, from the day of his decease," this was held to be good.[8]

A condition requiring alienation within a given time is bad[9]; and all restraints and alienation must be limited to a certain period, and if this is too remote, the restraint is bad also.[10] Where a testator devised property to his three sons, in fee simple and in joint tenancy, and stating that they "should not be at liberty to sell any part of my homestead farm, herein willed, except to each other, and so descend to their heirs, to the third generation," this restraint was held to be void.[11]

[1] *Attorney-General* v. *Hall*, Jac. 395.
[2] *Partington's* Case, 10 Rep. 36.
[3] *Co. Litt.* 206 B.
[4] *Ware* v. *Cann*, 10 B. & C. 433.
[5] *Co. Litt.* 233.
[6] *Attwater* v. *Attwater*, 18 Beav. 330, and see judgment of Sir G. Jessel, M.R., in *re Mackay*, L. R. 20 Eq. 129.
[7] *Re Macleay*, 20 L. R. Eq. 186.
[8] *Pennyman* v. *McCrogan*, 18 U. C. C. P. 132.
[9] *Shaw* v. *Bird*, 7 Chy. D. 669.
[10] *Larges'* Case, 2 Leon. 82.
[11] *Gallinger* v. *Farlinger*, 6 U. C. C. P. 512.

In regard to personalty, it is a good restraint to prohibit its alienation before it falls into possession, but after it falls into possession, there may be a gift over, if it has not been disposed of.[1] Chattel property cannot be given so as to be free from the creditors of the beneficiary.[2]

A condition requiring residence at a particular place is void[3]; but it has been held, in England, to be a good condition to require the legatee to live there[4]; and the residence of a legatee at the mansion house is not binding during minority, and is generally inapplicable to an infant person.[5] A bequest to A., in case he remain a steady boy, and live in some respectable family till twenty-one years of age, was held broken, where the beneficiary left the Province and enlisted in the United States army.[6]

Conditions in restraint of marriage are very general.

It is a good condition that the widow or widower should not marry,[7] or should not marry a particular person, or of objectionable religion, nationality or age; or of a particular profession, or under a stated income.[8] A condition that the minor must not marry without the consent of his parents or guardians, is perfectly reasonable and proper, and the consent must be a free consent[9]; and so may be good,[10] where the object is not to restrain a certain person from marrying, but to provide for her support while unmarried. A condition reducing shares, in case of a marriage, is void, as is also a condition subsequent in restraint of marriage.[11]

The father is the natural guardian of his children, and at his death the guardianship passes to the mother, in the

[1] *Bradley* v. *Peixoto*, 3 Ves. 324.

[2] *Barber* v. *Davis*, 12 U. C. C. P. 344; *re Jones*, 23 L. T. 211; *Brandon* v. *Robinson*, 18 Ves. 429.

[3] *Wilkinson* v. *Wilkinson*, 12 L. R. Eq. 304.

[4] *Ross* v. *Iles*, 20 W. R. 858.

[5] *Perry* v. *Roberts*, 25 L. T. 371.

[6] *Pew* v. *Lafferty*, 16 Chy. 408.

[7] *Barton* v. *Barton*, 2 Vern. 308; *Allen* v. *Jackson*, 1 Chy. D. 399.

[8] See cases in *Jarm.* on Wills.

[9] In *re Stephenson*, 18 W. R. 1066 V. C. B.

[10] *Jones* v. *Jones*, 1 Q. B. D. 279.

[11] *Bellairs* v. *Bellairs*, 18 Eq. 510.

event of his making no appointment. The appointment, if made in a will, is valid, of course, where the will is validly executed; and it would seem that such an appointment has no binding force, except as enforced by the conditions attached to the dispositions of property.[1]

Mr. Walkem cites authorities to shew that an instrument executed as a will, but which contained only an appointment of guardians to the testator's children, was not entitled to probate.[2] In the last edition of Prideaux (1879), the case of *re Morton* is treated as an authority for the position taken, that a will, merely appointing a guardian, need not be proved.[3]

The advantage of a residuary clause has been referred to before, and should not be overlooked. Circumstances may frequently arise so as to render inoperative any specified devise or bequest. The beneficiary may not be in existence when the bequest falls due, or he may be incapable of taking. Sometimes a beneficiary under a will is unfortunate enough to be a witness, or the husband or wife of a beneficiary may have acted as such. In such cases, unless there is a residuary devisee or legatee capable of taking all such portions of the testator's property as have not been disposed of, there is an intestacy as to the particular gift. No matter how small such gift may be, the distribution of it is always a matter of difficulty, and, where infants are concerned, generally a matter of resort to the court for administration. An effective residuary clause is a sure depository against an intestacy.

Another reason for such a clause is that the testator may be the recipient of a legacy or bequest from some unknown or unexpected quarter, or become entitled to property through the intestacy of some relative. If no provision be made for this in his own will, there is an intestacy as to that amount.

[1] 1 Redf. on Wills, 4 n. 2.

[2] Walkem on Wills, page 13; *re* Morton, 3 S. & T. 422; *Gilliat* v. *Gilliat*, 2 Phill. 222, Lady Chester's case, 1 Ventr. 207.

[3] Prideaux on Con. 420.

Even where there was no such place as the one described in the will, it can be shewn where the property is situate,[1] and a farm described as one lot may be construed to mean that and another.[2] On the other hand, where the provisions of the will would tend to shew an equal division of the property, a particular word may be restricted to mean less than may be supposed.[3] In personal property there is more frequently an intestacy than in real estate. Land being the same everywhere—except where the uses to which it is put are described in some cases, and not in others—the general term only is used; but with chattels the case is different. A bequest of specific chattels, and "whatever else I may have at my house," was held not to pass mortgages, and a bank receipt there[4]; and subsequent bequests may restrict a prior general devise.[5]

VII. FORM, ETC., OF THE INSTRUMENT.

With the foregoing as instructions, the solicitor prepares the draft will in his own office—that is unless, as often happens, he is obliged to draw it up and have it signed and witnessed on a first visit, when his client is not expected to outlive a second one.

A will may be written on any material and in any mode[6]; but it is better to write it on vellum, parchment or paper,[7] and with ink of one colour, and in the same handwriting throughout.[8] If a will be partly in ink and partly in pencil, the words in pencil may be rejected if the will is sensible without them.[9] But the will may consist, in part, of a printed form filled up with writing, or may even be in num-

[1] *Nicholson* v. *Burkholder*, 21 Q. B. 108.
[2] *Smith* v. *Boustead*, 13 Chy. 29.
[3] *Bigelow* v. *Bigelow*, 19 Chy. 549.
[4] *Smith* v. *Knight*, 18 Chy. 492.
[5] *Davidson* v. *Boomer*, 15 Chy. 1.
[6] Deane on Wills, p. 73.
[7] *Shep.* Touch, 54.
[8] *Re Bacon*, 3 No Cas. 645.
[9] *Re Adams*, L. R. 2 P. & M. 367.

bers and letters,[1] explained by a key; but the first-mentioned form of will may give rise to difficulties in probate, and the disadvantages of the second are obvious.[2]

The form of the instrument is not important, so long as its terms are testamentary[3]; but, if the instrument is in the form of a deed, the circumstance of the grantor receiving a life interest to himself, with a general power of revocation, does not make it testamentary.[4]

The form of a will is not material, as deeds, poll and indentures, deeds of gift, bonds, marriage settlements, letters, drafts, assignments, receipts, notes, orders, and even a power of attorney, have been held to be papers testamentary[5]; and, in one rather extraordinary case, *re Coulthard*,[6] a paper, described as a codicil, was admitted to probate, though no trace of the will could be found; and an instrument may operate partly as a deed and partly as a will.[7] A will may consist of several distinct papers, to be construed as one testamentary disposition[8]; and two persons jointly may make a will,[9] and it is irrevocable after one of them dies.[10]

There is no statutory form for a will—as for deeds—nor, indeed, a recognized form in general use amongst conveyancers as to the simplest dispositions. The result has been, that any intelligible form of words capable of expressing the testator's intentions will hold good if committed to writing and signed in the presence of two attesting witnesses. Letters have frequently been admitted to probate, and a deed—a document so unlike a will—has been admitted also, thus reversing the common saying, of taking the will for the deed, if that be a fair use of the latter word.

[1] *East* v. *Troyford*, 4 H. L. C. 517.
[2] Deane on Conveyancing, 404.
[3] Prideaux Con. 354.
[4] *Thompson* v. *Browne*, 3 M. & R. 32.
[5] See cases in Walkem on Wills, 160.
[6] 11 Jur. N. S. 184.
[7] *Re Newns*, 7 Jur. 688.
[8] See cases in Walkem on Wills, 167.
[9] *Re Stracey*, 1 Jur. N. S. 1177.
[10] See cases in Walkem on Wills, 170.

The following has been held to be a will sufficient to pass the fee:

"I make and give all my property, both land, house, and all the stock, and every other article I possess or own, to my loving wife, Elizabeth, making her my executrix.[1]"

If a man be in danger of immediate death, and should write on a slip of paper with a pencil as follows:

"I give all my property to my wife"—and sign his name at the end of it in the presence of two witnesses, who signed their names therein as witnesses at the same time, so that it would read:

I give all my property to my wife.

JOHN JONES.

JOHN DOE.
RICHARD DOE.

there is no doubt but that this would be a valid and effectual will, under which the wife, or any creditor, could take out probate, pay John Jones' debts, and the wife claim the balance. For, in the first place, the intention which governs in wills, is manifest that the wife is to get her husband's property; and in the next place, the words, "all my property" (or, indeed, "my property"), will convey everything that the husband will die entitled to—land, mortgages, chattels, money, stock, etc.; and the word "give" is sufficient to transfer whatever estate or interest the testator may have in the property mentioned.

It is not necessary for him to say, I, John Jones—it is the same as if he said, I, John Jones, give all my property to my wife—no more than it is necessary to connect and trace a noun to its representative pronoun. Nor need he say that it is his *last* will, in so many words, because, if he die, without making another, it is, of course, his *last* will; and the fact that he wishes two persons to witness and attest it, is evidence that it is his *will*. Nor, again, need he mention what his wife's name is, as he can only have one wife; and even if the law was more lenient in this respect, the witnesses may be able to prove by extrinsic evidence

[1] *Hicks* v. *Snider*, 44 Q. B. 486.

which one was meant—just as the Courts would find out his intention if he left it to his niece Sarah, and that he had two nieces of that name. And the name and place are not essential, as the witnesses can prove that when it becomes necessary; and as no form of attestation at all is necessary,[1] the witnesses can prove that they regard the paper as and for a will, at the request of the testator. But the witnesses must sign the paper, while the man is alive, and all three must be present at the same time, because, if the testator sign the paper, and one witness omit to sign it, at the time, he can't come back in half an hour, when the testator is dead, and hope to affix his name as a valid witness.[2] All the formalities of the Act must be complied with[3]; the writing may be in any language, and written with a pencil, if needs be. It need say nothing as to any former wills. This last will governs.

This trifling bit of paper, so executed, will, when admitted to probate, transmit to the wife a title to lands, goods, money, stock, etc., as potently, and often more so, than deeds of grant, assignments of mortgages, and other transfers, duly signed, sealed and delivered, with exuberant formality. The creditors must be paid, whether the will makes mention of them or not; and, indeed, it is useless to insert it in many cases, and apart from the practice of the Surrogate Courts, which could name the wife, in this case, "executrix by the tenor of the will," the well known principle of law, that the Court will never be at a loss for a trustee, can be successfully invoked to supply the omission.

The reader may think that when so simple a document would answer so much, why should an elaborate and extensive document be drawn up in so simple a case; but it will not be needlessly long with some necessary additions.

In the first place, a date, and the name of the place, are convenient, and should not be omitted; and, in the second,

[1] *Re Thomas*, 7 W. R. 270; *Bryan* v. *Whyte*, 2 Rob. 315.
[2] Unreported case of the Writer's.
[3] *Re Draper*, 3 N. R. 215.

though an attestation clause is not necessary, that this obviates the necessity of any form at all, not merely any particular form,[1] still it is desirable to add such a clause to a will, since, without it, probate will not be granted unless evidence is given, if obtainable, that all the formalities required by the Act have been complied with.[2] A suggested attestation clause is given with the precedents.

Some of the other disadvantages in a will of this kind have been referred to before. It is desirable to have an executor, and have provision made, in case the legatee or devisee die before the estate vests. In the event of a simple will giving all the property to husband or wife, the course of descent is entirely changed, as where there is no issue alive *after* their mother or father inherits thereunder.

Where a gift or legacy is followed by a gift over on the death of the legatee, the question often arises whether the death referred to is a death at any time, or a death within a particular period. Where it is a gift to A., and, if he shall die, to B., the contingency is the death of A. in the testator's life; where it is a gift to A., and if he shall die, without children, the death is at any time; where the gift is to X., for life, with remainder to A., and, if A. shall die, to B., the contingency is the death before X.; and, lastly, a gift to X., for life, with remainder to A., and, if he shall die without children, to B., means, as decided in the House of Lords, the death at any time, as in the case above.[3]

The frequency of this question being raised should, however, make the conveyancer very careful in explaining most distinctly the date, and period, and event on or from which the gift over is to take effect.

If the testator have real estate any place out of Ontario, then, the requirements of the law where it is situate, the *lex loci rei sitae*, must be followed; but no matter where his personal estate is, the will must be executed with the

[1] *Re Thomas*, 7 W. R. 270; *Bryan* v. *Whyte*, 2 Rob. 315.

[2] *Re Draper*, 3 N. R. 215.

[3] *Edwards* v. *Edwards*, 15 Beav. 357; *Mahoney* v. *Burdett*, L. R. 7 H. L. 388. See Prideaux Con. p. 384, 9th edition.

formalities of the testator's domicile[1]; and the personal estate is distributed according to the law of the domicile.[2] In this latter respect, it is the law of the domicile of the testator at his death that prevails, and not of that domicile where he resided when he made his will.[3]

VIII. EXECUTION.

After everything has been inserted in the draft will that the testator desires, and after reading it over for him, and suggesting anything for attention, a fair copy is made of it, where possible, and you attend him again to have the will executed. If you leave it with him for execution, he must be instructed on a good many points. The words of the Statute are, that the will shall be signed at the foot or end thereof, by the testator, or by some other person, in his presence, and by his direction.[4]

It is well to write out, in pencil, where he is to sign his name, and to draw lines on the left hand side of the last sheet of the will where there is writing, to indicate where the witnesses are to sign. This may seem elementary, but the result of not doing so may be to have the names of the witnesses and the testator mixed up, so that it would be difficult to say which was the testator's signature. The witness may sign his name, and write opposite it "executor," instead of witness, but this will make no difference.[5]

Then caution him that no person named in the will should be a witness, for though an executor[6] or trustee may be a good witness, still, all the writers recommend that he should not. Some day a question will arise, if it has not already arisen, whether an executor or trustee, entitled to compensation, may not forfeit his right thereto by signing

[1] Prideaux Con. 358.

[2] Prideaux Con. 416.

[3] *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Whicker* v. *Hume*, 7 H. L. Cas. 124.

[4] R. S. O. cap. 106, sec. 12.

[5] *Griffiths* v. *Griffiths*, L. R. 2 P. & M. 300.

[6] R. S. O. cap. 106, sec. 19.

as witness. But a creditor, or the wife or husband of any creditor, whose debt is charged on the real or personal estate of the testator, is a competent witness.[1] No legatee must be a witness, for though he is not incapacitated from being such, yet it cuts out his own legacy; and the husband or wife of a legatee, though a good witness, can take no interest under the will.[2] In such a disagreeable result, the disappointed legatee would not help you to get out probate with good grace.

Again, though you may have two or more witnesses, do not add a legatee as a third or fourth, in the hope that there being enough to attest the will without the legatee, his signature can do no harm—it will cut him out all the same. If a will has been inadvertently attested by two or more persons, one of whom takes some benefit under it, it is not necessary to make a new will; for a codicil, witnessed by two indifferent persons, and confirming the will, makes the gift valid.[3] This is all very well, if the testator is alive to execute it, but it is better to remember what is necessary at the time. A bequest or devise is not bad because the person entitled happens afterwards to marry a witness to the will under which the same is claimed.[4] But it is held, that a witness being a trustee, does not invalidate a gift made to him on trust, even when the particular way in which the gift is to be applied for the benefit of the object designated is left to his discretion.[5]

There is no seal necessary in wills, unless where a power of appointment is to be exercised by a writing under the hand and seal of the donee. In this case, it cannot be

[1] R. S. O. cap. 106, sec. 18.

[2] R. S. O. cap. 106, sec. 17.

[3] *Anderson* v. *Anderson*. L. R. 13 Eq. 381.

[4] Hay & Jarm. Wills 29 n. In regard to the hardships that will occasionally come from the best of rules, several cases in our own Courts are in point. In England, the Probate Court was in one case, *re Sharman*, L. R. 1 P. & M. 661, inclined to strike out the name of a third witness, added after execution, but if he signs as witness, and his name appears in the probate, he takes no benefit under the will. *Cozens* v. *Crout*, W. N. (1873) 144.

[5] *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69.

exercised by a will of the donee with the ordinary formalities.[1]

1. Signature. It would seem direction enough to say that a will is to be signed at the foot or end thereof; and yet many testators picked upon the most out-of-the-way places to sign their name—at the sides, at the top, at any vacant place that appeared.

Then, a clause like the following, taken from the Imp. Act, 15-16 Vic. cap. 24, sec. 1, which is surely ample enough, was inserted:

Every will, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, shall be deemed to be valid, within the meaning of this Act, if the signature is so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow, or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the *testimonium* clause, or of the clause of attestation, or follows, or is after, or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side, or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the

[1] *West* v. *Ray*, Kay, 392; *Taylor* v. *Meade*, 34 L. J. Chy. 203.

generality of the above enactment; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made. R. S. O. cap. 106, sec. 12.

Notwithstanding this, one testator preferred to have a whole sheet to himself and his witnesses, and then perversely wrote his name across the sheet[1]; and another disdained to occupy the space at the foot or end of the last page of his will, though there was room for him, but wrote on another sheet[2]; and in both cases the wills were held to be well executed.[3]

The will may be signed either by the testator or by some other person in his presence, and by his direction, but such signature must be made, or acknowledged, by him, in the presence of two or more witnesses present at the same time. He may be unable to write, or too ill to write, and so may make his mark,[4] or direct some one—one of the witnesses[5]—to write for him; and, in one case, the witness wrote his own name, but stated he did so on behalf of the testator, in his presence and by his direction.[6] But it is essential that the testator should know or approve of the contents of the will at the time of its execution.[7] If the signature be not made in the presence of two witnesses, it must be acknowledged before them. No particular form of acknowledgment is necessary, beyond a recognition that it is his signature, though it is not necessary to say this in so many words[8]; but the three persons must be present at the acknowledgment,[9] as at the actual writing of the signature.

[1] *Re Archer*, L. R. 2 P. & M. 252.
[2] *Re Wotton*, L. R. 3 P. & M. 159.
[3] See cases cited in Deane Con. 406.
[4] Jarm. on Wills, 104.
[5] *Re Bailey*, 1 Curt 914; *Smith* v. *Harris*, 1 Rob. 262.
[6] *Re Clark*, 2 Curt. 329.
[7] *Hastilow* v. *Stobie*, L. R. 1 P. & M. 64, and cases cited in Deane 407.
[8] *Keigwin* v. *Keigwin*, 3 Curt 607-611.
[9] *Re Ayling*, 1 Curt 913; *re Mansfield*, 1 No Cas. 362.

2. Witnesses. The witnesses are to attest, and judge of the testator's sanity when they attest; and if he is not capable, they have a right to refuse to attest. In some cases the witnesses are passive, but here they are active, and, in truth, the principal parties to the transaction—the testator is entrusted to their care.[1] In case of doubt, it would be but reasonable of the witness, in attesting, to state the doubt.

The advantage of an attestation clause is, that when the will, on the face of it, appears to be properly executed, the Court will presume that the requirements of the Act have been complied with, although the memory of the witnesses may have failed.[2] Where the attestation clause is informal, the presumption *omnia rite esse acta* applies with less force; but even in that case, the leaning of the Court is not to allow the testator's intention to be frustrated by lapse of time and failure of the memory of the witnesses; and if, therefore, the circumstances are such as reasonably to lead to the conclusion that the will was duly executed, the Court will adopt such conclusion.[3] On the other hand, the direct testimony of one of the witnesses, that the will was not duly executed, will disentitle to probate, notwithstanding the attestation clause being perfectly regular.[4] Where a third party swore that one of the witnesses did not attest his signature to a codicil until after the testator died, the legatee, entitled under the codicil, accepted the opinion of counsel that the codicil was ineffectual.[5]

It is not necessary that the witnesses should actually see the testator write—if they see him in the act of writing,[6] or even if they are in such a position that they may, if they please, see him in the act of writing.[7] But it is essential that there should be a possibility of the witnesses see-

[1] Lord Camden, in *Hudson* v. *Kersey*, 4 Burns, E. L. 27.
[2] Prideaux Con. 357.
[3] *Vinnicombe* v. *Butler*, 34 L. J. Prob. 18.
[4] *Croft* v. *Croft*, 34 L. J. Prob. 44.
[5] *Re Branniff*, unreported case of the writer's.
[6] *Smith* v. *Smith*, L. R. 1 P. & M. 143.
[7] *Newton* v. *Clarke*, 2 Curt 320.

ing the testator write,[1] and that his signature should be made or acknowledged *before* those of the witnesses are affixed to the will.[2]

And a witness may make a mark, even though he can write,[3] and even a marks-man may have a wrong surname written opposite his mark, if it be otherwise properly attested.[4] His signature must be made so that the testator can see him write.[5]

IX. REVOCATION.

Before proceeding to prove a man's will, it must be considered whether this will may not be revoked. Every will is revoked by the *marriage* of the party making it, except wills made in exercise of a power of appointment[6]; but the birth of a child after the making of a will does not revoke the will.[7] And a will is revoked if made on the same day, but previously to the testator's marriage, notwithstanding his intention to the contrary.[8] No alteration in the circumstances of the testator gives rise to any presumption of revoking, though it may defeat the entire object of the will, or any particular devise.[9]

A will may, of course, be revoked by a subsequent will or codicil, though the latter are silent as to former wills. A codicil confirms such parts of a will as it does not revoke.[9]

A will may be revoked by any writing—a letter, etc., if it be duly witnessed as a will[11]; or by the burning, tearing or destroying of a will *animo revocandi*.[12]

[1] *Re Colman*, 3 Curt 118.
[2] *Re Olding*, 2 Curt 865; *Re Byrd*, 3 Curt 117.
[3] *Re Amiss*, 2 Rob. 116.
[4] *Re Ashmore*, 3 Curt 756.
[5] *Newton* v. *Clarke*, 2 Curt 320, Deane Con. 407.
[6] R. S. O. cap. 106, sec. 20.
[7] *Re Tohey*, 6 Pr. R. 672.
[8] *Otway* v. *Sadlier*, 33 L. T. 46.
[9] *Farrar* v. *Winterton*, 5 Beav. 1; R. S. O. cap. 106, sec. 21.
[10] *Re Howard*, L. R. 1 P. & M. 636.
[11] *Re Durance*, L. R. 2 P. & M. 406.
[12] See R. S. O. cap. 106, sec. 22.

The destruction of a will, if not the act of the testator, must be in his presence as well as by his direction, so that taking it into another room and burning it there, is not a sufficient revocation.[1] After the testator's death, of course, it cannot be revoked, even at the written request of the testator, unless the writing is sufficient under the Statute. But if no will be found in the testator's custody, at the time of his death, then a will which, previous thereto, had remained in his custody, will be presumed to have been revoked by him in his lifetime.[2]

The provisions in our law relating to the revocation of a will by marriage, by change of circumstances, or by the act of the testator, apply to all wills since the 31st of December, 1868.[3]

Where obliterations, interlineations, or other alterations are made in a will, at or after the execution thereof, they must be executed the same as the will; and the initials of the witnesses set opposite in the margin of the will, or other explanatory memorandum, will be sufficient for that purpose.[4]

X. REGISTRATION OF WILLS.

A will need not be registered, unless where the title to lands in it is to be perpetuated; and, for this purpose, it can be registered at any time, and any person claiming land under it, cannot be cut out, by a sale or mortgage, from the heirs, provided he registers within one year from the death of the testator or testatrix. In case the devisee is under any disability, by reason of the will being contested, or by any other inevitable difficulty, not due to his wilful neglect or default, then he has twelve months after the removal of such impediments.[5] Infancy is not an inevitable difficulty within this section of the Registry

[1] *Re Dadds*, 29 L. T. 99.
[2] *Eckersley* v. *Platt*, L. R. 1 P. & M. 281-284.
[3] R. S. O. cap. 106, sec. 8.
[4] *Ibid*, sec. 23.
[5] R. S. O. cap. 111, sec. 75.

Act[1]; and all the circumstances of the case would have to be considered, in order to show how the devisees could be barred.[2]

XI. PROBATE.

In the event of the will not having been revoked, and it being ascertained, as far as may be in doubtful cases, that the will propounded for probate is the last will, or that the several wills, in a possible case, are entitled to probate, then the papers are prepared therefor.

After the death of the testator, and when the will is obtained, it is usual to read it over to the members of the family, and long usage, in this regard, has come to be regarded as customary law, and supposed by many to be essential to the validity of a will.

No steps are usually taken towards filing the necessary papers in the Surrogate Court till seven days after the death of the testator. In the meantime, however, the executors named in the will can be seen, and if they do not wish to act, a renunciation must be drawn up. If all refuse to act, or if they are dead, and the will is left with no one as executor, then, on the application of some person, unobjectionable and interested, either as next of kin, or as a creditor, the Surrogate Judge will appoint him administrator with the will annexed—*cum testamento annexo*. And where no person is named in the will as executor, this will be done, as has been remarked, where only one person is interested thereunder.

It is necessary, also, when friends of the deceased come in, in reference to proving a will, to get all necessary information as to the goods and chattels, money, stock, etc., etc., so as to be able to prepare the required inventory, and to give an approximate value to the personal estate. The fees payable at the Surrogate office will depend on the value of the personal estate; and it seems if any real

[1] *McLeod* v. *Truax*, 5 O. S. 455-459.

[2] See *re Davis*, 27 Chy. 199.

estate is to be sold, or turned into money, that this is to be regarded as personal estate.

You will also require the particulars as to the time and place of death of the deceased, where he had his usual place of abode, the names in full of the witnesses and of the executors.

The papers necessary to be prepared in proving a will are the following:

1. Petition to Surrogate Court.
2. Affidavit of death, place of abode, etc.
3. Affidavit of execution of will, by one of the witnesses thereto.
4. Executor's oath.
5. Inventory and affidavit verifying same.

Having prepared all these papers, and attached them to the will, the several deponents can come in and swear to them.

After the value of the property is calculated, you can see what fees are to be paid to the Surrogate Court under the following scale:

Where the value of the personal property is

Under $1,200	. . . . .	$2 00, Judge's fee.
From $1,200 to $3,000	. .	3 00, " "
From $3,000 to $4,000	. .	4 00, " "

Every additional $1000, add $1.00.

Under $200, only $2 is to be charged.

Additional fees to the Surrogate Court depend on the length of the will.

Having deposited the papers and money with the clerk, if everything is found sufficient, the probate will issue in a few days. In case of any defect in the papers sent in, you will be advised by the clerk as to how it may be remedied.

However, a more important check is a *caveat*, filed in the Surrogate office, in Osgoode Hall, or a writ of injunction from the High Court of Justice, enjoining the executors from proceeding to issue probate. This forms the contentious or litigious business of probate and wills, which is no part of this treatise.

As probate is better evidence of a will than the will itself, it follows that in a title to real estate, even where there is no personalty in the will, it is necessary that the will thereto be proved. The executor can safely act only when probate is issued; and probate is necessary in a will made in execution of a power, and affecting personalty[1]; but a will merely appointing a guardian need not be proved.[2] Besides, the executor transmits the representation—he is the link between the dead and the living. As to this, it may be remarked here that, if A., an executor, dies, having appointed B. his executor, B. becomes the executor of the original testator; but if the first executor dies intestate, his administrator does not represent the original testator, but letters of administration, *de bonis non*, with the will annexed, of the original testator, must be taken out. In like manner, if A. dies intestate, and B. takes out letters of administration to his estate, and afterwards dies, the executor or administrator of B. does not represent A., but new letters of administration, *de bonis non* of A., must be taken out.

If two or more persons are appointed executors, and all prove the will, the representation passes to the executor of the last survivor.[3]

On the issue of probate, the executors are the legal and authorized representatives of the deceased. They collect in his accounts, by suit or otherwise, and defend actions brought against his estate. They pay off creditors, who have proved true debts in the usual way, and for this they advertise for creditors in the county or other proper paper. They have a year within which to pay off debts and realize the estate; and no legatee can enforce the payment of his legacy by suit till after a year from the death of the testator. After that he can sue the executors the same as any other creditor. It is not till the last dollar of the personal estate is paid over that these duties are over. They can then apply to the Surrogate Court for their discharge, and, if

[1] Prideaux Con. 419.
[2] In *re Morton*, 33 L. J. Prob. 87.
[3] Prid. Con. 413.

necessary, to be allowed compensation under the Act in that behalf. They have nothing to do with the real estate, unless specially authorized under the will; nor are they interested in heirs, or next of kin, until a residue is left in their hands, which is not disposed of by the will. This they pay over to the next of kin, under the statute of distribution; though it does not often happen that an executor is called upon to do this. His position, in that regard, is the same as if he were administrator upon an intestacy.

An executor or administrator has no right, as such, to receive the rents of real estate; as to them, he is merely an intermeddler, and will not be entitled to any commission thereon[1]; but, in an exceptional case, where the widow administratrix collected the rents, and acted as guardian, the Court did not interfere with an allowance found by the Master.[2]

If an executor renounces, he forfeits any bequest in his favour.[3]

The statutory powers of executors are set out in the Rev. Stat. Ont., cap. 107

[1] *Dagg* v. *Dagg*, 25 Chy. 542.
[2] *Doon* v. *Davis*, 23 Chy. 207.
[3] *Paton* v. *Dickson*, 25 Chy. 542.

PRECEDENTS,

FORMS AND REFERENCES.

PRECEDENTS,

FORMS AND REFERENCES

UNDER THE PRECEDING CHAPTERS.

I. UNDER THE INTRODUCTORY CHAPTER.

I. PARTIES.

1. The Crown. Under the British North America Act, 1867, by sec. 92, sub-sec. 5, the Province of Ontario may exclusively make laws in relation to—

The management and sale of the public lands belonging to the Province, and of the timber and wood thereon.

By sec. 109 of the same Act—

All lands, mines, minerals and royalties, belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate, or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

On the other hand, by sec. 91, sub-sec. 1, the Parliament of Canada has exclusive legislative authority over the public debt and property, the duties and revenues forming the consolidated revenue fund, sec. 102; and all stocks, cash, bankers' balances and securities for money in each Province at the date of the Union belonging to the Dominion of Canada.

In this Province the public lands have retained the name of Crown Lands. Other territorial revenues, as escheats, have been appropriated by the Provincial authorities on behalf of the Crown; but the Supreme

Court of Canada has decided, in *Mercer* v. *The Attorney-General of Ontario*, that it is the Attorney-General of Canada who represents the Crown in such matters.[1]

R. S. O. cap. 94, declares that lands escheated by reason of intestacy, or where there are no lawful heirs, or where forfeited for any cause except crime, can be taken by the Attorney-General of this Province, on behalf of the Crown.

2. Corporations. See R. S. O. cap. 98, sec. 8, as to conveyance by bargain and sale.

Under R. S. O. cap. 167, any five or more persons may become incorporated for any *benevolent*, *provident* or *other purpose*, not illegal, and may hold and acquire lands to the value of not more than $5,000 per annum. The manner of becoming incorporated is as follows:

A declaration is drawn up setting out the intended corporate name, the objects of the society, the mode of electing officers, etc. This is signed by at least five of the intended corporators, and the fact of such execution proved in some way.

The declaration (usually executed in duplicate) is presented to a Judg of the County Court, or any of the Judges of the High Court of Justice, and if it appears to him to be in conformity with the Act he endorses a certificate to that effect on the declaration.

When the declaration is filed, either in the office of the Provincial Secretary, or in that of the Clerk of the Peace, for the County, the incorporation is complete.

Separate provisions are made for unincorporated societies existing before 1874. If the parties wish the certificate of incorporation to be unimpeachable they must follow the procedure laid down in the Statute, by publication in the *Ontario Gazette*, etc.

DECLARATION OF INCORPORATION.

Pursuant to the Revised Statute of Ontario, chaptered 167, and Amendments thereto.

We (*setting out the names of at least five of the intended corporators*) do solemnly declare that it is our intention to become incorporated under the Act respecting Benevolent, Provident and other Societies, Revised Statutes of Ontario, chaptered 167.

1. That the intended corporate name of our Society (*or Institution, etc., as the case may be*) is

[1] The result of the decision in this case has just come to hand—four of the six judges in the Supreme Court being in favour of the central authority—the Chief Justice and Mr. Justice Strong being in favour of the provincial rights. This decision will, no doubt, be appealed from.

2. That the objects of the said society are as follows:

3. That the manner in which our first trustees or managing officers is to be appointed is as follows:

In witness whereof we have hereunto set our hands at , in the county of this day of 188 .

Declared before me.

Witness.

A. B.
C. D.
E. F.
G. H.
I. J.

Certificate on the foregoing for the Judge to sign:

The within declaration having been presented to me after execution of the same by the parties thereto, as appears by the affidavit of , thereunto attached, I certify that the said declaration appears to me to be in conformity with the provisions of the Act respecting Benevolent, Provident and other Societies, R. S. O. cap. 167.

Justice of the High Court of
Justice, Division;
or,
Judge of the County Court
of the County of

Where the society has been in existence before 1874, some modifications of the declaration are necessary; and where the society has rules printed or otherwise for the election, etc. of officers, these can be attached to the declaration and filed with it.

Other Statutory provisions must be noted regarding—

Cemetery Companies, R. S. O. cap. 170.
Burial Societies, R. S. O. cap. 171.
Mechanics' Institutes, R. S. O. cap. 168; 42 Vic. cap. 29.
The property of Religious Institutions, R. S. O. cap, 216; 42 Vic. cap. 36, and 41 Vic. cap. 25.

3. Trustees and Executors. See R. S. O. cap. 107, as to these, and also as to administrators.

See also R. S. O. cap. 98, sec. 10 and 11, as to execution of powers.

4. Husband and Wife. See R. S. O. cap. 124, as to the solemnization of marriage.

The separate rights of property of married women are, so far as statutory separate estate is concerned, regulated by R. S. O. cap. 125. The conveyance of their real estate, legal or equitable, is effected by a deed of grant in which the husband is made a party thereto; but a Judge of the High Court of

Justice or of the County Court may, in certain cases, dispense with the husband's signature, under R. S. O. cap. 128.

The dower of married women is regulated by R. S. O. cap. 126, and 42 Vic. cap, 22, O.

An important Statute is R. S. O. cap. 129, securing to wives and children the benefit of assurances on the lives of their husbands and parents. An amendment to this, passed in 1881, 44 Vic. cap. 15, repeals sec. 15 of the Revised Statute, and prescribes that the assured may direct the application of bonuses and profits.

5. Infants, Lunatics, etc.

1. *Guardians, etc., of Infants.*

See R. S. O. cap. 132, and 44 Vic. cap. 16 O. as to guardians of infants, how appointed or removed, etc.

See R. S. O. cap. 135, as to guardians to minors—their rights and liabilities, and apprenticing the same; also, R. S. O. caps. 130, 131, as to the custody and support of children; R. S. O. cap. 124, sec. 13, as to marriage of a minor.

2. *Ratification of Promise during non-age.*

R. S. O. cap. 117, sec. 8, says:

"No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification is made by some writing signed by the party to be charged therewith, or by his agent duly authorized to make such promise or ratification."

6. Aliens.

The Naturalisation Act of 1881[1] (D) enacts that "Real and personal property of every description may be taken, acquired, held and disposed of by an alien, in the same manner, in all respects, as by a natural born British subject; and title to real and personal property of every description may be derived through, from, or in succession to, an alien, in the same manner, in all respects, as through, from, or in succession to, a natural born British subject."

But an alien cannot by this section be the owner of a British ship.

A married woman shall within Canada be deemed to be a subject of the State of which her husband is for the time being a subject.

Other particulars are given in this Act as to widows, children, etc.

---

[1] 44 Vic. cap. 13. (D). The proclamation appointing the time for this Act to come in force must be looked for.

The following forms are prescribed by the Act, and may be administered by any Judge, by a Justice of the Peace of the county or district where the alien resides, a Notary Public, Stipendiary Magistrate, or a Police Magistrate:—

THE NATURALIZATION ACT OF CANADA, 1881.

Oath of Residence.

I, A. B., do swear (*or, being a person allowed by law to affirm in judicial cases, do affirm*) that, in the period of years preceding this date, I have resided three (*or five as the case may be*) years in the Dominion of Canada with intent to settle therein, without having been, during such three years (*or five years, as the case may be*) a stated resident in any foreign country. So help me God.

Sworn before me at
on the
day of } A. B.

THE NATURALIZATION ACT OF CANADA, 1881.

Oath of Service.

I, A. B., do swear (*or, being a person allowed by law to affirm in judicial cases, do affirm*) that, in the period of years preceding this date, I have been in the service of the Government of Canada (*or, of the Government of the Province of , in Canada, or as the case may be*) for the term of three years, and I intend, when naturalized, to reside in Canada (*or, to serve under the Government of as the case may be*).

Sworn before me at
on the
day of } A. B.

THE NATURALIZATION ACT OF CANADA, 1881.

Oath of Allegiance.

I, A. B., do sincerely promise and swear (*or, being a person allowed by law to affirm in judicial cases, affirm*) that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, as lawful Sovereign of the United Kingdom of Great Britain and Ireland and of the Dominion of Canada, dependent on and belonging to the said Kingdom, and that I will defend Her to the utmost of my power against all traitorous conspiracies or attempts whatever which shall be made against Her

Person, Crown and Dignity, and that I will do my utmost endeavour to disclose and make known to Her Majesty, Her Heirs or Successors, all treasons or traitorous conspiracies and attempts which I shall know to be against Her or any of them; and all this I do swear (*or* affirm) without any equivocation, mental evasion or secret reservation. So help me God.

Sworn before me at
this
day of } A. B.

B. (*See Section* 12).

THE NATURALIZATION ACT OF CANADA, 1881.

Certificate under Section 12.

I, C. D. (*name and description of the person before whom the oaths have been taken—See Section* 11), do certify that A. B., an alien, on the day of , subscribed and took, before me, the oaths (*or affirmations*) of residence and allegiance (*or service and allegiance, as the case may be*), authorized by the tenth section of *The Naturalization Act, Canada*, 1881, and therein swore (*or affirmed*) to a residence in Canada (*or service, etc.*), of years; that I have reason to believe and do believe that the said A. B., within the period of years preceding the said day, has been a resident within Canada for (*three or five, as the case may be*) years (*or has been in the service of the Government of Canada for three years; or, as the case may be*), that the said A. B. is a person of good character, and that there exists, to my knowledge, no reason why the said A. B. should not be granted all the rights and capacities of a natural born British subject.

Dated at , the day of .

C.D.

If the above certificate be applied for by a person, with respect to whose nationality a doubt exists, and who desires a special certificate of naturalization under Section eighteen, add the following:

"I further certify that the said A. B. has doubts as to his nationality as a British subject, and desires a special certificate of naturalization under section eighteen of said Act."

If the above certificate be applied for by a person previously a natural born British subject, but who became an alien by naturalization, an appropriate statement to that effect should be inserted in the certificate.

II. RECITALS.

1. *Where Executor of Purchaser Conveys.*

WHEREAS the said E. F. duly made his will, dated the day of 18 , and thereby devised all his real estate to the said A. B. and his heirs, and appointed the said C. D. executor of his said will, and WHEREAS the said E. F. died on or about the day of without having altered or revoked his said will, which was duly proved in the Surrogate Court of the county of on or about day of June.

2. *Valuation.*

WHEREAS the said A. B. and C. D. have valued the said messuage or tenement and hereditaments at the sum of $, and annexed to their said valuation a declaration in writing subscribed by them of the correctness thereof.

3. *That Purchasers bought as Trustees.*

WHEREAS the said A. B. and C. D. purchased the said lot as trustees of the said will of the said C. D.

4. *State of Mortgage Debt.*

WHEREAS the principal sum of $1,000 is still due to the said A. B., but interest on the said sum has been paid up to the day of the date of these presents; or

WHEREAS there is now due to the said A. B. the sum of $1,000 for principal money, and the further sum of $52 for interest thereon up to the date hereof, making together the sum of $1,052 on the mortgage made to the said A. B., as aforesaid; or

WHEREAS there is now owing to the said A. B., on the security of the said indenture of mortgage, for principal, interest and costs, the sum of $1,000 and no more, and the said X. Y. is desirous of paying the said debt, etc.

5. *Sale by Auction.*

WHEREAS the said A. B. (*as creditors, assignee, etc.*) caused the lands hereinafter described to be put up for sale by auction on the day of last; and at the said sale the said E. F. was the highest bidder, and was declared to be the purchaser thereof, at the price of $5000.

6. *Renunciation of Probate.*

WHEREAS the said G. H., by a deed poll under his hand and seal, dated the day of renounced and disclaimed all and singular the real and personal estate whatsoever devised or bequeathed by

the said will, and all devises, bequests, legacies and benefits expressed to be made or given to him by the said will, and also the said office of trustee and executor of the said will, and all and singular the trusts and powers, authorities, rights and privileges whatsoever under the said will; or

WHEREAS the said G. H., having renounced probate, has never intermeddled with the estate of the said P. Q., or acted on any of the trusts of the said will.

7. Probate.

WHEREAS the said E. F. died on or about the day of without having altered or revoked his said will, which, on the day of was duly proved by the said C. D. in the Surrogate Court for the County of

8. Power to appoint new Trustees.

WHEREAS the said E. F. and G. H. were empowered, in case the said trustees should die or decline the execution of the trusts to appoint trustees in their place who should be invested with all the powers given to the trustees appointed, and

WHEREAS by an indenture, dated , the said I. J. and K. L. were, pursuant to the aforesaid power of appointing trustees, constituted trustees of the said settlement in the place of A. B. and C. D.

9. Power of Sale.

WHEREAS by the indenture now in recital, the said A. B. was empowered at any time after default in payment of the said sum of , or the interest thereof, or any part thereof, at the time aforesaid, to sell the said hereditaments by public auction or private contract; AND the indenture now in recital contains declarations to the effect that the receipt of the said A. B. for the purchase-money should be a sufficient discharge, exonerating the purchaser from all liability in respect of the application thereof; AND THAT the sale and conveyance to be made by the said A. B. should be conclusive on the said R. C., his heirs and assigns, whether such default as aforesaid should be made or not; AND WHEREAS the said A. B., in pursuance of the said power of sale, has contracted with the said W. X. for the sale to him of the said hereditaments hereinafter described, at the price of

(*See usual form under Deeds of Grant, post.*)

10. Attained Majority.

And WHEREAS the said C. B., who is the eldest son of the said A. B. and E. B., attained his age of 21 years on the day of last.

11. Marriage.

WHEREAS the said M. B., on the day of intermarried with H. J., deceased, and had issue three children and no more.

12. *Mortgage.*

WHEREAS, by an indenture, dated in consideration of the sum of $1,000, paid by the said A. B. to the said C. D., the lands hereinafter expressed to be hereby granted were conveyed to the said C. D., subject to a proviso for redemption of the said premises on payment by the said C. D. to the said A. B., the sum of $1,000 with interest at the rate of 7 per centum per annum, on the day of

13. *Lease.*

WHEREAS, by an indenture, dated all the lands and tenements were demised unto the said C. D., from the day of for the term of years, at the yearly rent of $500, payable quarterly, as therein mentioned, and subject to the covenants and conditions therein contained, and on the part of the lessee, his executors, administrators and assigns to be performed and observed.

14. *Intended Marriage.*

WHEREAS a marriage is intended soon to be solemnized between the said D. B. and E. F.

15. *Grant of Letters of Administration.*

WHEREAS the said F. R. died on or about the day of intestate, leaving the said P. R., his only son, and heir at law, and letters of administration of the goods, chattels and credits of the said F. R., were granted to the said N. D., on the day of by the Surrogate Court of the County of

16. *Inability to pay Debts.*

WHEREAS the debtor J. is indebted to the creditors for various sums of money, which he is unable to pay in full.

17. *Agreement to accept Composition.*

WHEREAS it has been agreed that the debtor shall pay to the creditors a composition of cents on the $, on the amount of the respective debts, at the time and in the manner hereinafter mentioned, which composition is to be accepted by the creditors in full satisfaction and discharge of these debts.

18. *Conveyance in Trust for Sale.*

WHEREAS, by an indenture, dated the lands hereinafter described, were conveyed unto and to the use of A. B. & C. D., and their heirs upon trust, at any time thereafter, at the request of the said E. F., to sell the said lands or any part thereof, by public auction or private

contract, and convey the same to, or according to, the directions of the purchaser thereof.

19. *Contract for Sale.*

WHEREAS the said A. B. has contracted with the said C. D. for the sale to him of the fee simple or possession of the said hereditaments, at the price of $1,000.

20. *Contract for Loan.*

WHEREAS the said A. B. has agreed to lend to the said X. Y. the sum of $, on having the repayment thereof, with interest, at the rate hereinafter mentioned, secured in the manner hereinafter appearing.

21. *Agreement for Husband and Wife to live apart.*

WHEREAS certain unhappy differences having arisen between the said A. B. and the said C. D., they have agreed to live separate from each other.

22. *Codicils not affecting devise of realty.*

WHEREAS the said testator made several other codicils to his said will, none of which revoked or in any manner affected the devise of his real estates contained in his said will.

23. *Assignment of Lease.*

And WHEREAS, by an indenture, dated the day of , made between A. B. of the one part, and C. D. of the other part, the premises demised by the hereinbefore recited indenture, were assigned to, and the same are now vested in, the said C. D., for all the residue of the term of years created by the said indenture of lease, subject to the payment of the rent reserved by and to the performance of the covenants contained in the same indenture

24. *Sale or Mortgage by Mechanics' Institute.*

WHEREAS, by a resolution of two-thirds of the directors or trustees of Mechanics' Institute, it was resolved, on the day of that a sale of the property hereinafter mentioned should be carried out; and WHEREAS by a meeting of the members of said Institute duly called by circular, on the day of , wherein it was stated that it was proposed to sell the said property; and WHEREAS there attended the said meeting members who were entitled to vote, and by a majority thereof the said sale was approved of.

(*The resolution of the directors or trustees must be approved of within six months, which the dates above will show*).

25. *Letters Patent.*

WHEREAS Her Majesty Queen Victoria, by letters patent, dated, etc., for herself, her heirs and successors, granted to the said A. B., his execu-

tors, administrators and assigns, or such others as he or they should at any time agree with, and no others, from time to time, and at all times hereafter during the term of fourteen years from the date thereof, the sole and exclusive license, privilege and authority to make, use, exercise and vend within the Dominion of Canada an invention for, etc.

26. Agreement for a Sale of Land.

WHEREAS the said party of the first part has agreed to sell to the said party of the second part, and the said party of the second part has agreed to purchase from the said party of the first part the lands and premises known as, etc.

27. Agreement for Partnership.

WHEREAS the said A. B. and C. D. have agreed to enter into a partnership and joint trade as grocers, to be carried on and exercised upon the terms and conditions and subject to the covenants, provisions and agreements hereinafter contained.

28. Assignment of Judgment Debt.

WHEREAS the said party of the first part recovered a judgment in the Queen's Bench Division of the High Court of Justice on or about the day of against John Smith for the sum of $1,000 damages, and $150 costs, making together the sum of $1,150; and whereas the said party of the first part has agreed to assign unto the said party of the second part the said judgment and all benefit to arise therefrom, either at law or in equity.

The Statute relating to Benevolent, Provident and other Societies. R. S. O. Cap. 167.

WHEREAS public notice of a general meeting of the has been duly given, pursuant to the by-laws of the said (*association or society, etc.*), and WHEREAS such meeting was specially called for considering a sale (*mortgage, exchange or lease*) of the land hereinafter mentioned; and WHEREAS a resolution was assented to by a majority of the members at the said general meeting, directing the said lands to be sold (*mortgaged, exchanged or leased, as the case may be.*)

III. ATTESTATION.

1. Ordinary.

Signed, sealed and delivered by the within named parties, in the presence of

2. By an Attorney.

Signed, sealed and delivered, as the act and deed of the within named A. B., by C. D., his duly authorized attorney, in the presence of

3. *By a Blind Party.*

Signed, etc., by the within named A. B. (*a blind person*). The contents of the within written indenture were first audibly and correctly read over to him, when he seemed perfectly to understand the same, in the presence of

4. *By a Deaf and Dumb Party.*

Signed, etc. (*who being deaf and dumb, but who could read*). The contents of the within written indenture were first read over by him, when he seemed, etc.

5. *By a Marksman.*

Signed, etc., by the within named A. B., the contents of the within written indenture being first read over to him, when he seemed perfectly to understand the same, and made his mark thereto, in the presence of

---

IV. TESTIMONIUM CLAUSE.

1. *Ordinary Clause.*

In witness whereof, the parties hereto have hereunto set their hands and seals this day of A. D. 1881.

Signed, sealed and delivered, in the presence of

2. *Power of Attorney.*

In witness whereof, the said A. B. has set his hand and seal, and G. H., by virtue of a power of attorney enabling him in that behalf, a copy whereof is hereunto annexed, has set the hand and seal of the said A. B,, this day of 1881.

Signed, sealed and delivered in the presence of

A. B.
By G, H., his Attorney.

(*See R. S. O. cap. 95, secs. 14 and 15, as to powers of attorney*).

3. *By a Corporation.*

In witness whereof, the said The Society have hereunto affixed its corporate seal, this day of A. D. 1881.

Signed, sealed and delivered by the President and Secretary of the said Society, pursuant to the provisions of their Act of Incorporation, in presence of (*or as the case may be*).

4. Mechanics' Institutes.

In witness whereof, the said Mechanics' Institute have hereunto affixed their corporate seal, and the President and Secretary of the said Mechanics' Institute have hereunto signed these presents in execution of this deed.

6. Religious Institutions.

(*See R. S. O. cap* 216.)

V. WITNESSING, ETC.

1. Affidavit for Registration.

County of } I, (*name in full—no initials*),
To wit: } of the of

In the County of (*fill in profession or occupation of witness—give some description*), make oath and say:

1. That I was personally present, and did see the annexed or within (*grant or mortgage, etc.*) and duplicate (*if there is one*) duly signed, sealed and executed by and the parties thereto (*or one of the parties thereto, as the case may be*).

2. That the said deed or mortgage, etc., and duplicate (*if there is one*) were executed at the of (*stating city or town, etc., and county*).

3. That I know the said parties, or one or more of them, according to the fact.

4. That I am a subscribing witness to the said deed or mortgage, etc., and duplicate, if there is one.

(*The witness must subscribe his name under the attestation clause and receipt clause in his own handwriting, as such witness. R. S. O. cap.* 111, *sec.* 46).

Sworn before me, at the of this day of 188 .

A Commissioner, or *Justice of the Peace, for the county, as the case may be*, or *the Registrar* or *Deputy-Registrar*, or *any Judge in Ontario.*

Usual name of witness.

The proof of the foregoing may be made by affirmation as well as by affidavit (*R. S. O. cap.* 111, *sec.* 45), and no party to the instrument can take the affidavit of the witness (*Ibid, sec.* 46.)

Where officers of a corporate body are required by Statute to attest the execution by the corporation, the preceding form may be used, with the addition that it was executed in the particular manner required by the Statute; but for the purposes of registration merely, any instrument under the seal of any corporation, with the signature of the secretary or presiding officer thereof is sufficiently evidenced by the seal thereof. The same applies to any Court of Record or to certificates in Chancery, etc.

2. *Affidavit for Registration of Crown Grant.*

Heading as in No. 1.

1. That I have compared the copy hereunto annexed with the Crown grant to [illegible] which the said grant is an exemplification of Crown grant to [illegible] and that the same is a true copy.

2. Other instruments except grants from the Crown and wills must be registered by a deposit of the original instrument or by the deposit of a duplicate or other original part thereof, with affidavit, as in No. 1.

The registration of wills will be referred to hereafter.

CHAPTER II.

TITLE.

SOLICITOR'S ABSTRACT.

A solicitor's abstract should contain a statement of the documents and evidence relating to certain particular premises in which all that is necessary to enable counsel to judge upon the validity of the title is given at length, and all that is immaterial is retrenched.[1]

The English rules as to the commencement of titles are of not much importance in this country, as the title is usually traced to the Crown; but it may be remembered that if this is not convenient, it is desirable to commence an abstract with a Deed rather than a Will, and that a mortgage is the best deed to commence with. The idea of a sixty years' title being good is not relied upon either here or in England.

It is recommended in arranging the deeds to give them in a *chronological order*. Where a party's name appears for the first time, a place of residence, the additions and the character as heir, executor, etc., should be fully set out, and different persons of the same name should be distinguished.

The *recitals* will hereafter be of considerable importance, and a recital should be set out in full, if it is to be noticed at all; and any recital which may materially affect the history of the legal or equitable title should be fully expressed.[2]

Powers, trusts or agreements should be fully set out, and as the validity of the deed may depend upon its conformity to these previous instruments, it is advisable to give the recital *verbatim*.

Uses to bar dower should be given in the language of the deeds, as should also powers which have been exercised, or which are to be exercised, in order to complete the title. Trusts must be abstracted so far as is necessary in order to shew that the act which was directed to be done has been duly performed. It seems that trusts should always be referred to, no matter whether exercised or not.

Births, marriages, deaths, etc., should be transferred into the Abstract, as they are there found; but other facts of importance should be given in chronological order.

The *testatum*, or witnessing clause, and the payment of the *consideration* money should be fully and correctly given; particularly when there is

[1] 3 Stewart Con. 1

[2] 1 Prest. Abstracts, 56.

necessity to see that it is paid to a particular person, or applied in a particular manner; and when it is stated that it is in full for the "absolute purchase, etc.," or "in full for the absolute payment and discharge," or when the consideration is blood or marriage.

The *parcels* must be given at full length, as they are contained in the first deed in the abstract, or in the grant from the Crown, but need not be referred to again so long as their identity is regularly preserved.

The *general words* need only be referred to where the deeds are not under our Statutory Forms.

The *habendum* is important where the estate is not limited to the grantee only, and in that case should be carefully looked into.

The *provisos* and *conditions* should always be abstracted; and in the case of leases, it is important that the exact circumstances under which the forfeiture is to take place should be set out. In leases, also, the reddendum clause should show the quantum of rent and the times of payment and as to the taxes, rates, etc.

Covenants should be noticed by their omission, or where they are qualified or unusual, and the class of representatives that are bound by them. All the burdensome covenants in a lease should be given.

The *execution* and *attestation* should set out sufficient to show that the deed was duly executed by all the necessary parties. If any prescribed manner is enjoined, it must appear that it was followed.[1]

The absence of the receipt clause may be constructive notice that the consideration money was not in fact paid.

Finally, it is recommended to abstract *memoranda* of registration, collateral agreement between the parties, any interlineation, or anything endorsed on the deed.

The abstract of a *will* should contain the name and description of testator—the words of the gift or devise—any qualifying expression in the words of the testator—the probate—the execution and attestation—so as to shew that the devisee was not a witness—the appointment of executors, and any codicils affecting the will. It is generally recommended that wills should be copied, not abstracted.

Where an intestacy occurs, the letters of administration should be referred to—their date—from what county—by whom obtained, etc.

Proceedings in the High Court of Justice set out the date of the writ or of filing the bill—names of the parties and the decree, Master's report, or other proceedings, so far as it affects the particular title.

The abstract should be accompanied by a statement of facts supporting the title, certificates, probates, letters of administration, genealogical tree, etc.[2]

R. S. O. cap. 109, being an Act to amend the law of vendor and purchaser and to simplify titles, is as follows:

1. In the completion of any contract of sale of land made after the passing of this Act, the rights and obligations of vendors and purchasers shall

[1] See R. S. O. cap. 98, secs. 10 and 11, as to execution of powers.

[2] These observations have been taken from Gardenor's Directions for Drawing Abstracts, kindly lent the writer by Mr. Taylor, Q.C.

be regulated by the following rules (*but subject to any stipulation in such contract to the contrary*), namely :—

(1.) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.

(2.) Registered memorials of discharged mortgages shall be sufficient evidence of the mortgages without the production of the mortgages themselves, unless and except so far as such memorials shall be proved to be inaccurate; and the vendor shall not be bound to produce the mortgages unless they appear to be in his possession or power.

(3.) In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, or, in other cases, if possession has been consistent with the registered title, the memorials shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials shall be proved to be inaccurate; the vendor shall not be bound to produce the original instruments unless they appear to be in his possession or power, and the memorials shall be presumed to contain all the material contents of the instruments to which they relate.

(4.) Where a registered deed of conveyance acknowledges payment of the consideration money, such acknowledgment shall be sufficient evidence of payment, except so far as such acknowledgment shall be proved to be inaccurate.

(5.) The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

2. In suits at law or in equity it shall not be necessary to produce any evidence which, by the first section of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of such suits.

3. A vendor or purchaser of real or leasehold estate in Ontario, or their representatives respectively, may at any time or times, and from time to time apply in a summary way to the Court of Chancery, or a judge thereof, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract); and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of, and incidental to, the application shall be borne and paid.

As to title by possession, see Act as to Limitation of Actions, R. S. O. cap. 108. As to Wills, R. S. O. cap. 106. Inheritance, cap. 105. Mechanics' Liens, R. S. O. cap. 120. Improvements Under a Mistake of Title, R. S. O. cap. 95.

CHAPTER III.

AGREEMENTS AND CONDITIONS OF SALE.

FORMAL PARTS OF AN AGREEMENT.

Memorandum of agreement made this day of A.D. 188 ,

Between of the first part, and of the second part.

Witnesseth, that the said parties hereto do hereby agree, each with the other, in manner following:

1. That, etc. (*Here add the terms of the particular agreement.*)

In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of (*Witness.*) L.S. L.S.

AGREEMENT FOR THE SALE OF LAND.

Formal parts as above.

1. That the party of the first part agrees to sell to the party of the second part, and the party of the second part has agreed to purchase of and from the party of the first part, the lands and premises hereinafter mentioned being (*here set out the lands as minutely as possible, and the interest the purchaser is to take therein*), for the price and sum of $ of lawful money of Canada, to be paid as follows. (*Then set out the manner and days of payment, and the rate of interest*).

2. The party of the second part to investigate the title to the same premises at his own expense, (*here add any restrictions as to title-deeds, title, etc.*), and to tender a good and sufficient conveyance to the party of the first part for execution thereof, free from all dower and other encumbrances.

3. The party of the second part is to take possession, and the said premises are to be at his risk on the day of *(as the case may be)*.

4. In case the title cannot be made out to the satisfaction of the party of the second part, he, the party of the second part, shall not be entitled to any compensation for any expense incurred in the examination of the title, and he shall have one month to examine the same.

5. The mortgage to be given by the party of the second part is to contain the usual covenants, including a covenant to insure to the extent of $

6. The party of the first part is to pay all taxes, rates and assessments, but the proportionate part of the taxes for the current year is to be borne by the party of the second part.

7. Time is to be of the essence of this agreement.

8. The party of the first part is to be at the expense of satisfying the requisitions of title, the execution of the conveyances to the party of the second part, and of the mortgage to himself, and of registering the same, and the party of the second part is to bear all the other expenses.

In witness whereof, etc.

Attention may be called to the matter set out—*ante* pages 62-64—and any of the foregoing clauses or others may be used, so as to carry out the intention of the parties.

Where an agreement for a lease is required, the term of years, the manner of payment, and the amount of the rent and the covenants must be considered. See *post* leases. In order that an agreement for a lease may not operate as a lease, it is desirable to state that it is intended to operate as an agreement only.

AGREEMENT FOR A MORTGAGE.

(Identify the parties as borrower and lender.)

1. The lenders will advance and the borrower will advance upon the security hereinafter mentioned a loan of $

2. The borrower shall execute a proper mortgage deed with the usual covenants to repay principal and interest.

3. The terms of the mortgage are to be as follows:—

4. The security shall be first mortgage in fee simple, with good title to the property offered as security.

5. Preparation of the deeds shall be made at the expense of the borrower, and all other expenses to be incurred or incidental to the said loan.

CONDITIONS OF SALE.

R. S. O. cap. 98, prescribes the following as to auctions:—

Sec. 13. Unless in the particulars or conditions of sale by auction of any land, it is stated that such land will be sold subject to a reserved price,

or to a right of the seller to bid, the sale shall be deemed and taken to be without reserve.

Sec. 14. Upon any sale of land by auction without reserve, it shall not be lawful for the seller or for a puffer[1] to bid at such sale, or for the auctioneer to take knowingly any bidding from the seller or from a puffer.

Sec. 15. Upon any sale of land by auction subject to a right of the seller to bid, it shall be lawful for the seller or any one puffer to bid at such auction in such manner as the seller may think proper.

Sec. 16. Nothing in the four next preceding sections contained shall be taken to authorize any seller to become the purchaser at the sale.

Sec. 18. Renders a vendor or mortgagor liable in damages for concealing any settlement, deed, will, or other instrument, material to the title, or any incumbrance, or for falsifying the pedigree of the title. There is a criminal liability also by fine or imprisonment, or both, for such fraudulent concealment, etc. 29 Vic. cap. 28, sec. 20 D.

CONDITIONS OF SALE IN USE BY THE HIGH COURT OF JUSTICE.

1. No person shall advance less than at any bidding under nor less than at any bidding over and no person shall retract his bidding.

2. The highest bidder shall be the purchaser, and if any dispute shall arise as to the last or highest bidder the property shall be put up at a former bidding.

3. The parties to the suit, with exception of the vendor and are to be at liberty to bid.

4. The purchaser shall at the time of sale pay down a deposit in the proportion of for every of his purchase money to the vendor, or solicitor, and shall pay the remainder of the purchase money on the day of next, and upon such payment the purchaser shall be entitled to the conveyance and to be let into possession, the purchaser at the time of sale to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense and tender the same for execution.

6. If the purchaser fail to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited, and the premises may be re-sold and the deficiency (if any) by

[1] Puffer means a person appointed to bid on the part of the seller. Sec. 12.

such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

Dated the day of A.D. 18

I agree to purchase mentioned in the annexed particulars for the sum of and upon the terms mentioned in the above conditions of sale.

Dated the day of A.D. 188 .

Witness

SPECIAL CONDITIONS OF SALE.

In addition to the conditions used in the High Court of Justice the following circumstances may be made the subject of special conditions:

1. The production of the title-deeds.

2. Any mistake in the description of the property, or other error not to annul the sale, but to be the subject of compensation.

3. Valuation of fixtures or timber, etc.

4. Restrictions as to the title—effect of recitals—copies of deeds.

5. Particulars of the mortgage (if any) to be given by the purchaser. This may either be done by a lengthy condition, or by attaching a draft mortgage.

6. Particulars of rents, outgoings, possession, etc. Where the property put up for sale is in mortgage, but not sold under a power of sale, in such mortgage reference should be made to this fact.

Sales by trustees or assignees, etc., should apprise the purchaser of the character in which they sell, so that the purchaser may not expect full covenants.

CHAPTER IV.

SALES OF LAND.

"Land" extends to messuages, lands, tenements and hereditaments, whether corporeal or incorporeal, and to any undivided share thereof, and to any estate or interest therein, and to money subject to be invested in the purchase of land, or of any interest therein, so far as the transfer of real property is concerned[1]; but under the Short Forms Act for Sales and Mortgages, "land" extends only to all freehold tenements and hereditaments, whether corporeal or incorporeal, or any undivided part or share therein respectively.[2]

A contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent into or upon any land, may be disposed of by deed, but no such disposition shall by force only of this Act defeat or enlarge an estate tail, and any such disposition by a married woman shall be made in conformity with the provisions of the Married Woman's Real Estate Act.[3]

Under the Act[4] respecting free grants and homesteads, it is provided that neither the locatee, nor any one claiming under him or her, shall have power to alienate (*otherwise than by devise*), or to mortgage or pledge any land located as aforesaid, or any right or interest therein, before the issue of the patent.[5]

No alienation, (*otherwise than by devise*), and no mortgage or pledge of such land, or of any right or interest therein by the locatee after the issue of the patent, and within twenty years from the date of such location, and during the life-time of the wife of such locatee, shall be valid or of any effect, unless the same be by deed, in which she is one of the grantors with her husband, nor unless such deed is duly executed by her.[6]

On the death of the locatee, whether before or after the issue of the patent for any land so located, all his then right and interest in and to such

[1] R. S. O. cap. 98, sec. 1.
[2] *Ibid*, cap. 102 & 104, sec. 1.
[3] *Ibid*, cap. 98, sec. 5.
[4] R. S. O. cap. 24, sec. 14.
[5] *Ibid*, cap. 24, sec. 14.
[6] *Ibid*, cap. 24, sec. 15.

land shall descend to and become vested in his widow during her widowhood in lieu of dower, in case there be such widow surviving such locatee; but such widow may elect to have her dower in such land in lieu of the provision aforesaid.[1]

It has been held that free grants of lands for homesteads are only authorized to be made to men.[2]

The following is a summary of the Free Grants Act and Regulations:

SUMMARY OF THE FREE GRANTS ACT AND REGULATIONS.

1. Any man over 18 years of age may be located for 100 acres as a free grant. The male, *or sole female*, head of a family, who has a child or children under 18 years of age residing with him or her, may be located for 200 acres as a free grant; and the male head of a family may purchase an additional 100 acres at the rate of fifty cents per acre cash.

2. In townships which are sub-divided into sections and quarter sections, or into lots containing 160 or 320 acres each—the applicant for location, whether the head of a family or a single man, may be located for a full quarter section, or 160 acres, and may purchase an additional 160 acres.

3. Where a locatee is entitled to two lots, (200 *acres*), he must select lots that are adjoining, or at least near enough to be occupied and cultivated as one farm.

4. Locations are made by the local Crown Lands Agents, with whom the necessary affidavits must be deposited before the location will be carried out.

5. A locatee is allowed one month to enter upon and occupy his land.

6. The settlement duties required are: *to have at least 15 acres cleared and had under cultivation, of which 2 acres at least are to be cleared and cultivated annually during the five years next after the date of location, to build a habitable house, 16x20 feet in size; and to actually and continuously reside upon and cultivate the land for five years after location.* Absence, however, from the land for in all not more than six months in any year, shall not be considered a cessation of residence, provided that the land be kept under cultivation. Upon performance of these settlement duties, and at the expiration of five years from the date of location, the patent may be issued.

7. Upon failure to perform the aforesaid settlement duties, the location is liable to forfeiture. Applications for cancellation of a location must be made through the local agent, and evidence of disinterested parties must be filed, showing the position of the land, the length of time it has been unoccupied, and the whereabouts of the locatee (*if known*).

8. A locatee who holds two lots (200 *acres*) may perform his settlement duties on either one or both lots, as he finds most convenient.

[1] *Ibid*, cap. 24, sec. 17.

[2] *Rogers* v. *Lowthian*, 27 Chy. 559.

9. A locatee who purchases an additional 100 acres, must clear 15 acres thereon and cultivate the same for five years from the date of sale, before he will be entitled to the patent. Building a house and actual residence is not required on a purchased lot, where it is held in connection with a free grant.

10. All pine trees and minerals on the land are reserved, and the Commissioner of Crown Lands has power to issue licenses to cut timber on lands located or sold under the Free Grants Act and Regulations. The locatee, however, may cut and use such trees as may be necessary for the purpose of fencing and fuel; and may also cut and dispose of all trees required to be removed in actually clearing his land for cultivation; but pine trees cut in process of clearing shall be subject to the payment of the usual timber dues to the Crown.

11. Holders of timber licenses have the right to haul their timber over the uncleared portion of any land located or sold, and to make such roads as may be necessary for the purpose, and to use all slides, portages, and have free access to all streams and lakes.

12. The Crown reserves the right to construct on any land located or sold, any colonization road, or deviate from any allowance for road, and to take from such land material for that purpose without compensation.

13. The locatee has no power to sell or alienate his land (*except by will*) until after issue of patent.

14. No alienation (*except by will*) nor mortgage after issue of patent, and within 20 years from location, shall be valid, except the wife be one of the grantors.

15. In case of the death of the locatee, leaving a widow, the land vests in her during widowhood, unless she prefers to accept her dower in it.

16. The land, while owned by the locatee, his widow or heirs, shall be exempt from liability for debt during 20 years from date of location. This exemption does not, however, extend to a sale for taxes legally imposed.

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR LOCATION,

Under the Free Grants Act, by a Party who is entitled to only One Hundred and Fifty Acres.

I, of make oath and say, that I have not been located for any land under the "Free Grants and Homesteads Act," or under any regulations passed by Order in Council under the said Act; nor have I obtained a patent for any land, under the said Act, as a free grant, or under the authority of that portion of the said Act which provides for the remission of arrears due to the Crown by settlers in the Free Grant Townships; that I am of the age of years, and that I desire to be located for lot number in the Concession of the Township of that I believe the said land is suited for settlement and cultivation and is not valuable chiefly for its mines, minerals, or pine timber; and that such

location is desired for my benefit, and for the purpose of actual settlement and cultivation of such lands, and not either directly or indirectly for the use or benefit of any other person or persons whatsoever, nor for the purpose of obtaining, possessing or disposing of any of the pine trees, growing or being on the said land, or any benefit or advantage therefrom, or any gold, silver, copper, lead, iron or other mines or minerals, or any quarry or bed of stone, marble or gypsum thereon, and that the said lot is wholly unoccupied and unimproved, except

SWORN before me at
this day of
18

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR LOCATION.

Under the Free Grants Act, by a party who is the head of a family, having children under 18 years of age.

I, of make oath and say, that I have not been located for any land under the "Free Grants and Homesteads Act," or under any regulations passed by Order in Council, under the said Act; nor have I obtained a patent for any land as a free grant, under the said Act, or under the authority of that portion thereof which provides for the remission of arrears due to the Crown by settlers in the Free Grant Townships; that I am the male head of a family having children under eighteen years of age (consisting of son and daughter ,) residing with me, and that I desire to be located under the said Act, and the Regulations of the 27th May, 1869, made thereunder, for lot number in the Concession, and lot number in the Concession of the Township of that I believe the said lands are suited for settlement and cultivation, and are not valuable chiefly for their mines, minerals, or pine timber; and that such location is desired for my benefit, and for the purpose of actual settlement and cultivation of such lands, and not either directly or indirectly for the use or benefit of any other person or persons whatsoever, nor for the purpose of obtaining, possessing, or disposing of any of the pine trees growing, or being on the said lands, or any benefit or advantage therefrom, or any gold, silver, copper, lead, iron, or other mines or minerals, or any quarry, or bed of stone, marble, or gypsum thereon, and that the said lots are wholly unoccupied and unimproved, except

Sworn before me at
this day of
18

We of the in the and
of the in the jointly

and severally make oath and say: That we are well acquainted with named in the above affidavit, and that he is the head of a family, and has children under eighteen years of age (consisting of son and daughter), residing with him.

Sworn before me at
this day of
18

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR ISSUE OF PATENT TO A FREE GRANT LOCATION.

ONTARIO.
County of
To Wit:

We, of the Township of in the County of and in the Township of in the County of each for himself, make oath and say,

That I am well acquainted with lot number in the Concession, of the Township of ; that now resides upon the said land, and has actually and continuously resided upon, and cultivated the same for years last past; that there are acres of it cleared, cultivated, and had under crop, and a habitable house of the dimensions of feet, by feet, erected on the same; that these improvements were made by, and on behalf of the said and that he, this deponent, is not aware of any adverse claim to, or occupation of, the said lot.

And I, ( ), the applicant for myself, make oath and say that I have been an actual and continuous resident on the said land for years, and have cleared, cultivated and had under crop acres, and erected a habitable house, feet by thereon; that there is no adverse claim to the said lot; and that I have not been located, nor have I received patent for any other land under the Free Tenants and Homesteads Act, or the Regulations made thereunder, as a free grant, or by remissions of arrears due to the Crown on land purchased on free grant townships.

Sworn before me at
in the County of
this day of

I have reason to believe that the statements made in the above affidavit are correct.

Crown Land Agent.

---

1. *Statutory Deed of Conveyance, under R. S. O. cap.* 102.

THIS INDENTURE, made the day of A.D. 18 , in pursuance of the Act respecting Short Forms of Conveyances: BETWEEN *(recitals, etc.)*

WITNESSETH, that in consideration of $ of lawful money of Canada, now paid by the said part of the part, to the said part of the first part, the receipt whereof is hereby by acknowledged, the said part of the first part do grant unto the said part of the part, heirs and assigns, for ever:

All, etc. *(parcels)*.

The said part of the first part covenant with the said part of the part, that ha the right to convey the said lands to the said part of the part notwithstanding any act of the said part of the first part.

And that the said part of the part shall have quiet possession of the said lands.

Free from all incumbrances.

And the said part of the first part convenant with the said part of the part, that will execute such further assurances of the said lands as may be requisite.

And the said party of the first part covenants with the said party of the part that he will produce the title deeds enumerated hereunder and allow copies to be made of the same at the expense of the said party of the part.

And the said part of the first part covenant with the said part of the part, that ha done no act to encumber the said lands.

And the said part of the first part release to the said part of the part all claims upon the said lands.

And the said A. B., wife of the said part of the first part, hereby bar dower in the said lands.

In witness whereof, etc.

2. *Conveyances not under the Statute.*

Instead of the word "grant" being used alone it is usual to add "grant, bargain, sell, convey, confirm, etc." The general words under sec. 4 of R. S. O. cap. 102 should be added, and the expanded forms of the covenants should be used. (See Appendix.)

3. *Deed under Power of Sale.*

(Recitals as ante page 260. *Strike out all the covenants, except that the grantor has done no act to encumber that he releases all his claims upon the land, and that the matters recited in the said Deed are true.)* Or

THIS INDENTURE, made (*in duplicate*) the day of 18 , in pursuance of the Act respecting Short Forms of Conveyances.

BETWEEN hereinafter called "the grantor," of the first part hereinafter called "the grantee," of the second part.

WHEREAS one by indenture of bargain and sale, by way of mortgage, made the day of 18 , and duly registered in the registry office of the under number did grant and convey the lands, hereditaments and premises hereinafter particularly described unto herein called the grantor for securing payment of the sum of and interest as therein mentioned.

AND WHEREAS in said mortgage there is contained a proviso that in case the said should make default in payment of principal or interest for month the said grantor giving notice to the said might enter on and lease or sell the said lands.

AND WHEREAS it is further provided in and by the said mortgage that on any default in the payment of interest, the whole of the principal should at once become due and payable.

AND WHEREAS default has been made in payment of the said sum of , and notice of sale has been duly given to the said

AND WHEREAS the said lands have been advertised for sale pursuant to the said power contained in said mortgage by public auction at by advertisement inserted in the proper newspapers and by posters.

AND WHEREAS the said lands were offered for sale at public auction pursuant to such advertisement as aforesaid, and the sale conducted in a fair open manner when the said grantee was declared the highest bidder at and for the price and sum of $

NOW THIS INDENTURE, etc.

(*Add usual words of conveyance, etc. Omit covenants, except that grantor has done no act to encumber, and add general release and the following covenant.*)

The said grantor covenants with the said grantee that the facts as cited herein are true, and that the mortgage under which this sale takes place is a good and valid security.

(*The mortgagee's wife need not be a party.*)

In witness whereof, etc.

Where there is no power of sale in a mortgage the deed should set out the requirements of the Statute, 42 Vic. cap. 20.

4. *Deed by Executors.*

Recitals as ante page 259. As to death, probate, etc.; also the powers vested in executors with covenants, that they have done no act to encumber, and releasing all their claims.

5. *Deed by a Married Woman.*

If the husband has no interest as in the case of the wife's equitable estate the husband is not a necessary party[1] ; but where she is legally and equitably entitled he is generally made a party for the sake of conformity. Where he has no interest he should be made a party of the third part, and a clause added, "that the said A. B., husband of the party of the first part, is made a party hereto and executes this instrument for the sake of conformity." If the husband has any interest in the lands, this will not convey it out of him; and so it frequently happens that husband and wife are made parties of the first part. The difficulty about this is that the husband might afterwards be estopped from saying he had no interest in the lands so conveyed, and would moreover be consistently obliged to join in the covenants with his wife—a thing to which he may reasonably be supposed to object. As a sort of middle course a clause, may be added to the above, granting to the purchaser all the husband's interest in the lands.

6. *Deeds from husband to wife and vice versa.*

These conveyances can be done in two ways; either by a conveyance under the Statute of Uses, where the party of the first part grants to a third party to hold unto, and to the use of the husband or wife, or by two separate instruments. Most conveyancers would prefer the latter mode.

7. *Conveyances by Corporate bodies.*

(See recitals ante and particular statutes as to execution, attestation, registration, etc.*)*

8. *Conveyances Under the Mortmain Acts.*

The law, as to conveyances of land, or money, or stock to be laid out in land for charitable uses, within the Mortmain Acts, is laid down in the leading case of *Corbyn* v. *French*,[2] and the following formalities must be attended to:

1. The conveyance must be by deed, sealed and delivered and executed in the presence of two or more witnesses.

2. It must be executed twelve calendar months before the death of the grantor.

3. In England, it must be enrolled in Chancery within six calendar months after execution; but in Ontario, registration is sufficient without enrolment in Chancery,[3] and it was a question if registration even be necessary.[4]

[1] *Adams* v. *Loomis*, 22 Chy. 99.
[2] 4 Ves. 418. (Indermaur Con Cas.)
[3] *Hambly* v. *Fuller*, 22 C. P. 141.
[4] *Mercer* v. *Hewston*, 9 C. P. 349.

4. The deed must take effect in possession immediately from the making without any reservation or limitation for the benefit of the grantor or any person claiming under him.[1]

[1] The Statute does not apply to pure personalty—stock to be laid out in land must be transferred six months before the death of the grantor. A deed *inter vivos* is necessary; a will for the purpose being quite outside the Statute.

CHAPTER V.

LEASES.

See R. S. O. cap. 136, as to landlord and tenant; cap. 137, as to overholding tenants; cap. 98, sec. 4, requiring written leases to be by deed; 11 Geo. II. cap. 19, as to fraudulent removal of goods from premises, and as to payment of double rent, after the tenant has given notice to quit; and 4 Geo. II. cap. 28, as to double value, where notice is given by the landlord; and 32 Henry VIII. cap. 34, as to covenants running with the assignee of the reversion;

See, also, 43 Vic. cap. 16 O. as to seizure of the goods of lodgers; the Judicature Act of 1881, as to set-off against rent; the Assessment Act R. S. O. cap. 230 and R. S. O. cap. 116, as to covenants being assignable.

LEASE UNDER THE STATUTE R. S. O. CAP. 103.

This Indenture made the day of in the year of our Lord one thousand eight hundred and in pursuance of the Act respecting short forms of leases.

Between

of the first part,
and
of the second part.

WITNESSETH, that in consideration of the rents, covenants and agreements, hereinafter reserved and contained on the part of the said party of the second part, his executors, administrators and assigns to be paid—observed and performed—the said party of the first part ha demised and leased, and by these present do demise and lease unto the said party of the second part executors, administrators and assigns, all that messuage or tenement situate

TO HAVE AND TO HOLD the said demised premises for and during the term of to be computed from the day of one thousand eight hundred and and from thenceforth next ensuing and fully to be complete and ended.

YIELDING AND PAYING therefor, yearly, and every year during the said term hereby granted unto the said party of the first part, heirs, executors, administrators or assigns, the sum of to be payable on the following days and times, that is to say, on, etc.; the first of such pay-

ments to become due and to be made on the day of next.

And the said party of the second part covenants with the said party of the first part to pay rent; and to pay taxes; and to repair; and to keep up fences, and not to cut down timber; and that the said party of the first part may enter and view state of repair; and that the said party of the second part will repair according to notice; and will not assign or sub-let without leave; and that will leave the premises in good repair.

Proviso, for re-entry by the said party of the first part on non-payment of rent, or on non-performance of covenants.

The said party of the first part covenants with the said party of the second part for quiet enjoyment.

In witness, etc.

It is usual in all leases to insert a clause, that if the lessee, or his assigns, shall make any assignment for the benefit of creditors, or become bankrupt or insolvent, that the next payment of rent is to become immediately due and payable, and that the term should become forfeited and void.

It is better that the term should be held forfeited or void at the option of the lessor.

A similar covenant is added as to the interest of the lessee being seized or attached by any creditor.

Clause as to renewal may be as follows:

And, also, that immediately after the expiration of the said term of years, he, the said party of the first part, his heirs and assigns, shall and will grant another lease of the said hereby demised premises, with the appurtenances, containing the like covenants, conditions, provisoes and agreements as are in this lease contained and expressed, and at and under a certain yearly rent, payable in quarterly payments, the amount whereof to be ascertained in manner following, that is to say: To be fixed on, and determined upon, and declared by two appraisers, to be named and appointed, one of them by the said party of the first part, his heirs and assigns, the other by the said party of the second part, executors, administrators and assigns, with power to them, the said appraisers, to name and call in a third if they cannot agree; such appraisement to be made within fourteen days after the end of the term hereby granted: such rent to be payable in quarterly payments as aforesaid, and to commence from and immediately after the termination of the first term.

UNDERLEASE.

An underlease may be for any term less by one day than the original lease, and the demise clause should be worded accordingly.

The covenants should follow those in the original lease, and any additional ones with the underlessee, as may be agreed upon.

NOTICE TO QUIT BY LANDLORD.

To A. B., or whom else it may concern:

I HEREBY give you notice to quit and deliver up to me, on or before the day of 18 the peaceable and quiet possession of the premises you now hold of me, with the appurtenances, situate in the of

Dated this day of A.D. 18 .

Yours, etc.,

Witness: (*Lessor.*)

NOTICE TO QUIT BY TENANT.

To A. B., Esq.:

I HEREBY give you notice that it is my intention to determine the said lease, and to quit and deliver up on or before the day of 18 , the possession of the premises now held by me, with the appurtenances, situate at in the township of in the county of ,

Dated this day of A.D. 18 .

Yours, etc.,

Witness: (*Lessee*).

NOTICE TO CLAIM DOUBLE RENT.

To A. B.

I GIVE you notice that if you do not deliver up possession of the house and premises situate No. in street, in the of on the day of according to my notice to quit, dated the day of I shall claim from you double the yearly value of the premises for so long as you shall keep possession of them after the expiration of the said notice, according to the Statute in such case made and provided.

DISTRESS WARRANT.

To A. B., my bailiff, Greeting.

DISTRAIN the goods and chattels of the tenant in the house he now dwells in or upon the premises in his possession, situated

for the sum of being the amount of rent due to me on the same, on the day of 18 , and for your so doing, this shall be your sufficient warrant and authority.

Dated the day of A.D. 18 .

APPRAISERS' OATH.

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your judgment. So help you God.

INVENTORY.

AN INVENTORY of the several goods and chattels distrained by me the day of in the year 18 in the house, outhouses and lands of situate by authority and on behalf of your landlord, for the sum of being rent due to the said on the day of 18 .

In the dwelling-house :

On the premises:

Mr. Take notice, that as the bailiff to your landlord, I have this day distrained on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of being rent due to the said the day of 18 for the said premises; and that unless you pay the said rent, with the charges of distraining for the same, or replevy within five days from the date hereof, the said goods and chattels will be appraised and sold according to law.

Given under my hand, the day of A.D. 18 .

Witness :

APPRAISEMENT.

MEMORANDUM, that on the day of in the year of our Lord 18 , of sworn appraisers, were sworn upon the Holy Evangelists, by me of well and truly to appraise the goods and chattels mentioned in the inventory, according to the best of your judgment.

Constable.

Present at the swearing of the said and witness thereto.

MEMORANDUM TO BE ENDORSED ON THE INVENTORY.

MEMORANDUM: That on the day of in the year of our Lord 18 , of , and of , were sworn on the Holy Evangelists by me, of , constable, truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment. As witness my hand.

(*Signatures, etc., as above.*)

BAILIFF'S SALE.

NOTICE is hereby given, that the cattle, goods and chattels, distrained for rent on the day of 18 , by me as bailiff to the landlord of the premises of the tenant, will be sold by public auction, on the day of 18 , at o'clock, which cattle, goods and chattels are as follows, that is to say:

day of 18 .

SURRENDER OF LEASE.

Where a surrender of a lease is required to be in writing, it must be by deed, and may be conveniently written on the back of the lease intended to be surrendered. No particular form of words is necessary, if the intention can be gathered that the lessee intends to surrender and yield up to the lessor the lease in question, for the unexpired portion of the term. A covenant may be added that the lessee has, in himself, good right, full power, and lawful and absolute authority to surrender and yield up the premises to the lessor.

CHAPTER VI.

MORTGAGES.

See R. S. O. cap. 99, as to mortgages of real estate, merger, discharges, etc.; R. S. O. cap. 98, as to Frauds in sales and mortgages; R. S. O. cap. 104 as to short forms of mortgages; R. S. O. cap. 111, as to discharges of mortgages; 44 Vic. cap. 14 O., as to bar of dower; 43 Vic. cap. 42, D., as to stating the interest in the mortgage; 42 Vic. cap. 20, O., as to power of sale; 44 Vic. cap. 10, as to discharge of mortgages by married women.

MORTGAGE OF LAND UNDER R. S. O. CAP. 104.

THIS INDENTURE, made (in duplicate) the day of A.D. 18 , in pursuance of the Act respecting Short Forms of Mortgages, BETWEEN

WITNESSETH, that in consideration of of lawful money of Canada, now paid by the said mortgagee to the said mortgagor (*the receipt whereof is hereby acknowledged*(, the said mortgagor do grant and mortgage unto the said mortgagee heirs and assigns forever:

All and singular, th certain parcel or tract of land and premises

PROVIDED this mortgage to be void on payment of of lawful money of Canada, with interest at per cent. per annum, as follows: and taxes and performance of statute labour.

The said mortgagor covenant with the said mortgagee that the mortgagor will pay the mortgage money and interest, and observe the above proviso;

That the mortgagor ha a good title in fee simple to the said lands; and that he ha the right to convey the said lands to the said mortgagee and that on default the mortgagee shall have quiet possession of the said lands, free from all encumbrances. And that the said mortgagor will execute such further assurances of the said lands as may be requisite.

And also, that the said mortgagor will produce the title deeds enumerated hereunder, and allow copies to be made at the expense of the mortgagee.

And that the said mortgagor ha done no act to incumber the said lands; and that the said mortgagor will insure the building on the said lands to the amount of not less than currency; and the said mortgagor do release to the said mortgagee all claims upon the said lands, subject to the said proviso:

Provided that the said mortgagee on default of payment for month may enter on, and lease, or sell the said lands:

Provided that the mortgagee may distrain for arrears of interest; provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable; provided that until default of payment the mortgagor shall have quiet possession of the said lands.

And the said A. B., wife of the said mortgagor, hereby bars her dower in the said lands.

In witness whereof, the said parties hereto, have hereunto set their hands and seals.

MORTGAGE OF LEASEHOLDS.

Mortgage of leaseholds should recite the lease and the agreement for the loan, and should then assign the land contained in the lease to the mortgagee, subject to the repayment, as in other mortgages. Similar covenants are entered into, as in the case of the assignment of a lease, and the ordinary covenants in a mortgage. It is apprehended that nothing will be gained by making a mortgage of a lease in pursuance of the Act respecting Short Forms of Mortgages, if that Act applies only to freehold mortgages.

THIS INDENTURE, made the day of , 18 , between A. B., of, etc., of the one part, and C. D., of, etc., of the other part: Whereas by an indenture, dated the day of , 18 , and made between (*lessor*) of the one part, and (*lessee*) of the other part, for the considerations therein mentioned, all (*copy parcels from lease verbatim*), with the appurtenances, were demised unto the said (*lessee*), his executors, administrators and assigns, from the day of then last, for years, at the yearly rent of $, and subject to the covenants and agreements therein contained; and whereas by divers mesne assignments, and ultimately by an indenture, dated the day of , 18 , and made between of the one part, and the said A. B., of the other part, the said piece or parcel of ground, with the messuages or tenements thereon erected, and then known as Nos. and in aforesaid, became vested in the said A. B., his executors, administrators and assigns, for all the residue of the term therein, subject to the payment of the rent reserved by and to the performance of the covenants and agreements contained in the said indenture of lease; and whereas the said C. D. hath agreed to advance the said A. B. $ on having the same with interest secured in manner hereinafter appearing:

Now, this indenture witnesseth, that, in consideration of $ on the execution hereof paid by the said C. D. to the said A. B., the receipt of which sum is hereby acknowledged, he, the said A. B., doth by these presents assign unto the said C. D., his executors, administrators and assigns, all that the piece or parcel of ground comprised in and demised by the hereinbefore-recited indenture of lease, together with the messuages or tenements thereon erected and built, and which are now known and distinguished as and in aforesaid, and now or late in the occupation of and , and all other the messuages or tenements and buildings erected or standing on the said piece or parcel of ground in and demised by the hereinbefore-recited indenture of lease, with the easements and appurtenances thereto belonging or enjoyed therewith, To hold the said premises with their appurtenances, unto the said C. D., his executors, administrators and assigns, henceforth for all the remainder of the said term of years granted by the hereinbefore-recited indenture of lease :

Provided always, that if the said A. B., his executors, administrators or assigns, shall on or before the day of next pay unto the said C. D., his executors, administrators or assigns, the sum of $, together with interest for the same in the meantime, after the rate of per cent. per annum, without any deduction, then the said C. D., his executors, administrators or assigns, will thereupon, at the request and costs of the said A. B., his executors, administrators or assigns, reassign the said premises unto the said A. B., his executors, administrators or assigns, or as he or they may direct ;

Provided also, that if default shall be made in such payment, it shall be lawful for the said C. D., his executors, administrators or assigns, at any time thereafter, without any further consent on the part of the said A. B., his executors, administrators or assigns, to sell the premises hereby assigned, or any part thereof, either together or in parcels, and either by public auction or private contract, and subject to such conditions of sale and generally in every respect as the said C. D., his executors, administrators or assigns shall deem fit, with power to buy in the same at any auction, or rescind any contract for sale of the same, and to resell the same from time to time in manner aforesaid, without being responsible for any loss occasioned thereby, and upon any such sale to assign the premises sold unto the purchaser or purchasers, his or their executors, administrators and assigns, or as he or they may require : and it is hereby declared that the said C. D., his executors, administrators and assigns, shall stand possessed of the monies to arise from any such sale, upon trust, in the first place to pay the costs, charges and expenses of and incidental to such sale and the carrying the contract thereof into complete execution, and in the next place upon trust to repay himself and themselves all and every such sum or sums of money as may then be due or owing to him or them under or by virtue of this security, and to pay the surplus (if any) of the monies arising from such sale unto the said A. B., his executors, administrators or assigns : And it is hereby declared, that every receipt which shall be given by the said C. D., his executors, administrators or assigns, for any purchase or other monies to be derived from any such sale or

sales, or otherwise under these presents, shall be an effectual discharge to the person or persons to whom such receipt or receipts shall be given for the money therein acknowledged to be received; and that the person or persons taking such receipt shall not be answerable or accountable for the misapplication or non-application of the money therein mentioned to be received: And the said A. B. doth hereby for himself, his heirs, executors and administrators, covenant with the said C. D., his executors, administrators and assigns, as follows, namely, that he the said A. B., his executors or administrators, will on or before the day of next pay unto the said C. D., his executors, administrators or assigns, the sum of $ together with interest for the same in the meantime after the rate of per cent. per annum, without any deduction; and also, that at the time of the execution hereof the said indenture of lease is a good, valid and subsisting lease, and not forfeited or surrendered; and that all and every the covenants therein contained, and on the part of the lessee, his executors, administrators or assigns to be observed or performed, have been observed and performed up to the date hereof; and also, that he the said A. B. now hath in himself good right to assign the said premises unto the said C. D., his executors, administrators and assigns, in manner aforesaid free from all incumbrances; and also, that the said A. B., his executors or administrators, and all other persons having or claiming any estate, or interest in, or out of the said premises, will at all times hereafter at the request of the said C. D., his executors, administrators or assigns, but at the costs of the said A. B., his executors, administrators or assigns, execute every such further assurance for better assuring the said premises unto the said C. D., his executors, administrators and assigns, as he or they shall require; and also will from time to time and at all times hereafter, so long as any money shall remain due on the security of these presents, perform and observe the covenants (and particularly the covenant for insurance against loss or damage by fire) contained in the hereinbefore-recited indenture of lease, and on the part of the lessee, his executors, administrators or assigns, to be observed or performed, and keep the said C. D., his executors, administrators and assigns indemnified from and against any breach of the same; and also will at the request of the said C. D., his executors, administrators or assigns, produce to him or them from time to time the receipt for the premiums and duty payable on such insurance for the current year.

In witness, etc.

NOTICE OF SALE.

(42 *Vic. cap.* 20, *Ontario*).

To

In the matter of the sale of lot under "An Act to give to mortgagees certain powers now commonly inserted in mortgages."

I, hereby require you on or before the day of 18 , to pay off the principal money and interest secured by a certain indenture of mortgage, dated the day

of 18 , and expressed to be made between on all th which said mortgage was registered in the registry office for the on the day of 18 , under the number , and has since become the property of the undersigned.

And I hereby give you notice that the amount due on the said mortgage for principal, interest and costs respectively, is as follows:

And unless the said principal money and interest and costs are paid on or before the said day of 18 , I shall sell the said property, comprised in the said indenture (and above described), under the authority of the Act entitled "An Act to give to mortgagees certain powers, now commonly inserted in mortgages," at

Dated at the day of 18 .

Witness:

SHORT NOTICE OF SALE BY MORTGAGEE.

To Mr. and whom else it may concern:

I hereby request payment of the sum of $, with interest thereon, from the day of last, owing to me by virtue of the indenture of mortgage executed by you, bearing date, the day of 18 ; and I hereby give you notice, that unless the same be paid within calendar months from the delivery hereof, I shall proceed to a sale of the and hereditaments in the said indenture comprised, in execution of the power thereby vested in me.

Dated this day of 18 .

DISCHARGE OF MORTGAGE.

(*Statutory*).

PROVINCE OF ONTARIO, } DOMINION OF CANADA.
To WIT: }

To THE REGISTRAR of the .lo certify that ha satisfied all money due on, or to grow due on a certain mortgage made by which mortgage bears date the day of A. D. 18 , and was registered in the registry office for the on the day of A.D. 18 , at minutes past o'clock noon, in Liber for as No. and that such mortgage has been assigned (*Here state whether mortgage*

assigned or not.) And that I am the person entitled by law to receive the money; and that such mortgage is therefore discharged.

Witness my hand this day of A.D. 18 .

Witness:

Where the discharge is to effect only a part of the lands mortgaged, it can set out the lands, and state that the discharge is to operate to the extent of releasing them only. A formal instrument of release of part of the mortgaged premises is also used for this purpose.

(*Ordinary affidavit of execution*).

CHAPTER VII.

ASSIGNMENTS.

See 32 Henry VIII. cap. 34, as to assignment of covenants in leases; R. S. O. cap. 116, as to this, and as to choses in action; also, 44 Vic. cap. 5, sec. 17.

1. GENERAL FORM OF ASSIGNMENT BY ENDORSEMENT.

KNOW ALL MEN BY THESE PRESENTS, that I, the within named A. B., in consideration of $ to me paid by C. D., have assigned to the said C. D. and his assigns, all my interest in the within-written instrument, and every clause, article, or thing therein contained; and I do hereby constitute the said C. D. my attorney, in my name, but to his own use, to take all legal measures which may be proper for the complete recovery and enjoyment of the assigned premises, with power of substitution.

In witness, etc.

2. ASSIGNMENT OF LEASEHOLDS.

THIS INDENTURE, made the day of 18 , between (*vendor*), of etc., of the one part, and (*purchaser*), of etc., of the other part: WHEREAS, by an indenture bearing date the day of 18 , and made between (*lessor*) of the one part, and (*lessee*) of the other part, for the considerations therein mentioned the said (*lessor*) did demise unto the said (*lessee*) his executors, administrators and assigns, all (*here copy the parcels from the lease verbatim*), with their rights, easements and appurtenances. To hold the same unto the said (*lessee*), his executors, administrators and assigns, for the term of years, at and under the yearly rent of $, and subject to the covenants therein contained, and on the part of the (*lessee*), his executors, administrators and assigns, to be observed and performed: And

WHEREAS, by virtue of divers assignments and other Acts in the law, and ultimately by an indenture bearing date the day of , and made between A. B., of the one part, and the said (*vendor*) of the other part, the premises comprised in and demised by the hereinbefore recited indenture, have become vested in the said (*vendor*), for the residue of the said term of years therein, subject to the payment of the rent of $ reserved by and to the perform-

ance of the covenants and conditions contained in the said indenture, and on the part of the lessee, his executors, administrators and assigns, to be observed and performed: And

WHEREAS, the said (*vendor*) hath contracted with the said (*purchaser*) for the sale to him of the premises hereinbefore described, and intended to be hereby assigned for the residue of the term therein, subject to the payment of the rent reserved by and to the performance of the covenants contained in the said lease, but free from all other incumbrances, for the sum of $:

Now, this indenture witnesseth, that in consideration of $ to the said (*vendor*) paid by the said (*purchaser*) on the execution hereof, (the receipt whereof, and that the same is in full for the purchase of the said premises, the said (*vendor*) doth hereby acknowledge and declare), he, the said (*vendor*), doth, by these presents, assign unto the said (*purchaser*), his executors, administrators and assigns, all and singular the messuages or tenements, and all other the premises comprised in and demised by the hereinbefore recited lease, to hold the said premises unto the said (*purchaser*), his executors, administrators and assigns, henceforth for all the residue of the term of years therein, subject to the payment of the rent of $ reserved by and to the performance of the covenants contained in the hereinbefore recited lease, and which from and after the day of last, are, or ought to paid, observed and performed:

And the said (*vendor*) doth hereby for himself, his heirs, executors and administrators, covenant with the said (*purchaser*), his executors, administrators and assigns, that (notwithstanding any act or thing by the said (*vendor*), or any person claiming, through, under, or in trust for him), the said lease is now a good, valid and subsisting lease, unforfeited and unsurrendered, and in nowise become void or voidable.

And that the rent thereby reserved, and the covenants therein contained, have been paid, observed and performed up to the day of last; and also that the said (*vendor*) now hath good right to assign the said lease, and the premises thereby demised, for the term and in manner aforesaid, free from incumbrances;

And, also, that the said (*vendor*), and any person claiming as aforesaid, will at all times during the continuance of the said lease, at the request and costs of the said (*purchaser*), his executors, administrators or assigns, make and execute all such further and other acts and assurances for further and better assuring the said premises unto the said (*purchaser*), his executors, administrators and assigns, for the term and in manner aforesaid, as the said (*purchaser*), his executors, administrators or assigns, shall reasonably require:

And the said (*purchaser*), doth hereby for himself, his heirs, executors, administrators and asssgns, covenant with the said (*vendor*), his executors and administrators, that he, the said (*purchaser*), his executors, administrators or assigns, will, at all times hereafter during the residue of the term for which the said premises are holden, pay the rent of $ reserved by, and perform the covenants contained in the hereinbefore

recited lease, and which, from and after the day of last, are, or ought to be paid, observed or performed; and will, in the meantime, keep indemnified the said (*vendor*), his heirs, executors and administrators, from and against the non-payment of the said rent, and the non-observance or non-performance of the said covenants, or any of them.

In witness, etc.

Besides the recital of the lease, the contract for sale is sometimes mentioned. Where the right to assign is not apparent, a covenant for right to convey is added, and also that the assignee will enjoy the premises free from all encumbrances, except the rent and covenants.

3. ASSIGNMENT OF MORTGAGES.

An assignment of a mortgage sets out the original mortgage, the state of the mortgage debt, and the agreement for the transfer. It should assign the land as well as the debt and that the mortgagee did no act to encumber, and where obtainable, a covenant from him to pay the debt if the mortgagor does not pay it.

This indenture made the day of , 18 , Between E. F., of, etc. (hereinafter called the assignor,) of the first part; and G. H., of, etc. (hereinafter called the assignee), of the second part, Whereas, by indenture of mortgage, bearing date the day of , 18 , made between one A. B., of, etc., of the first part; C. D. (wife of the said A. B., and for the purpose of barring her dower), of the second part; and the said E. F., of the third part; the said A. B. did convey and assure the lands and premises hereinafter described, unto the said E. F., his heirs, executors, administrators and assigns, subject to a proviso for redemption on payment of $, and interest thereon, at the rate of per cent. per annum, on the days and times, and in the manner, in the said indenture of mortgage mentioned. And whereas, there is now due upon the said mortgage, for principal money, the sum of $; and for interest, the sum of $. Now, this indenture witnesseth, that, in consideration of the sum of $, of lawful money of Canada, now paid by the said assignee to the said assignor, the receipt whereof is hereby acknowledged, he, the said assignor, doth hereby grant, assign, and transfer unto the said assignee, his heirs, executors, administrators, and assigns, the said indenture of mortgage, and the principal and interest moneys thereby secured, and the lands and premises thereby conveyed to wit: All and singular (*here describe the premises*), to have, hold, receive and take, the said indenture of mortgage, and the principal and interest moneys thereby secured, and the lands and premises thereby conveyed unto the said assignee, his heirs, executors, administrators and assigns, to and for his and their sole and only use: subject, nevertheless, to the proviso for redemption in the said mortgage contained. And, for the better enabling the said assignee, his executors, administrators and assigns, to recover and receive the said principal moneys and interest,

from the said A. B., his executors or administrators, he, the said assignor, doth hereby nominate and appoint the said assignee, his executors, administrators and assigns, to be the true and lawful attorney and attorneys of him, the said assignor, his executors or administrators, for him, the said assignor, his executors or administrators, and in his, or their, names or name, but at the cost and charges of the assignee, his executors, administrators or assigns, to sue for and recover the said principal moneys and interest, in any court of law or equity; and on receipt or recovery, to give good and sufficient discharges; and generally to do, and execute, all such acts, deeds, matters and things, as may be requisite and necessary, for the recovery of the said mortgage money and interest. And the said assignor doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree, to and with the said assignee, his executors, administrators and assigns, that the said indenture of mortgage is a good, valid and subsisting security, free from all incumbrances, and not discharged or released, and that the principal moneys and interest hereinbefore mentioned, are now justly due and owing upon the security of the said mortgage; and that the said assignor has good rights to assign and transfer the said mortgage; and will not at any time hereafter release or discharge the same, without the consent of the said assignee, his executors, administrators or assigns; and that the said assignor, his heirs, executors or administrators, will at all times, on the request, but at the costs and charges of the assignee, his executors, administrators and assigns, execute such further assignments or assurances of the said indenture, and the moneys thereby secured, and the lands therein comprised, as may be necessary; and the said assignee doth hereby, for himself, his executors, administrators and assigns, covenant, promise and agree, to and with the assignor, his heirs, executors and administrators, that he the said assignee, his executors or administrators, in case he or they shall act upon the power of attorney, hereinbefore contained, will save harmless, and indemnify the said assignor, his heirs, executors and administrators, of and from all costs, charges and expenses, to which he or they may become liable, or be put unto, in consequence thereof.

In witness, etc.

4. ASSIGNMENT OF CHATTEL MORTGAGE.

(See R. S. O. cap. 119.)

(Recite chattel mortgage to the end of mode of payment, also the state of the mortgage debt, and the agreement for the assignment in question, and, as in the case of other assignments, convey the goods and chattels as well as the mortgage debt, subject to the proviso for redemption. Covenants are added that there is a debt due to the assignor; that he has done no act to impair the security; and for further assurances.

5. ASSIGNMENT OF CHOSE IN ACTION.

(*By Deed.*)

THIS INDENTURE made, etc.

WHEREAS, (*Recite the subject matter of the transfer that the debt is unpaid and the agreement for the sale to the assignee.*)

TESTATUM and receipt clause; the party of the first part doth grant and assign unto the party of the second part.

All that said and all and every sum and sums of money now due and owing on the said and the full benefit thereof.

Together with full power and authority (*power of attorney to take all necessary steps to secure and recover the premises assigned, etc. But this would seem to be unnecessary under R. S. O. cap.* 116.)

COVENANTS.—And the said doth hereby for himself and his heirs, covenant with the said that for and notwithstanding anything by him, the said done or suffered, or to which he has been party or privy, the said is in full force and effect uncancelled and entirely unsatisfied.

And that, notwithstanding any such thing as aforesaid, he, the said now hath full power and authority to assign the premises hereby assigned in manner aforesaid, and according to the true intent and meaning of these presents.

And that, notwithstanding any such thing as aforesaid, it shall be lawful for the said and his assigns, peaceably and quietly, to take, recover and enjoy the said premises at all times hereafter, without any interruption or disturbance.

And, *that* free from encumbrance. And further, that, notwithstanding any such thing as aforesaid, he, the said shall and will, at all times hereinafter, upon every request, and at the costs and charges of the said and his assigns, make and do all such further and reasonable acts and things for the more effectually assuring the premises to the said and his assigns in manner aforesaid, as by the said and his assigns may be required

In witness, etc.

6. COPYRIGHTS.

(*See Copyright Act of* 1875, 38 *Vic. cap.* 88.)

An application for the registration of a Copyright, *if made by the Proprietor himself*, shall be made after the following form:

To the Minister of Agriculture,
(Copyright Branch) Ottawa.

I (*name of person*) domiciled in Canada (*state the place and province*), *or in any other part of the British Possessions* (*state the place*), *or being a citi-*

sen of any Country, (state the Country), having an International Copyright treaty with the United Kingdom, as the case may be) hereby declare that I am the proprietor of the (*book, map, chart, etc., etc., as the case may be*), called (*title or name, as the case may be*) and that the said (*book, map, etc., as the case may be*) has been published in Canada by (*name of the publisher thereof*), in the (*name of the locality where the publication has taken place*) in the Province of (*Quebec, Nova Scotia, New Brunswick, etc., as the case may be*), and hereby request the registration of the same, and for that purpose I herewith forward the fee required by the Copyright Act of 1875 together with two copies of the (*book, map, chart, etc., as the case may be; if the object is a painting, a sculpture, or any other work of art, a written description of such work of art.*)

In testimony thereof, I have signed in the presence of the two undersigned witnesses at the place and date hereunder mentioned.

(*Place and date.*)

(*Signature of the Proprietor.*)

Signature of the two witnesses. }

7. INTERIM COPYRIGHT.

An application for the registration of an Interim Copyright, *if made by the proprietor himself*, shall be made after the following form:—

To the Minister of Agriculture,
(*Copyright Branch.*)
Ottawa.

I (*name of person*), domiciled in Canada, (*state the place and Province*), *or in any other part of the British Possessions (state the place), or being a citizen of any country (state the country), having an International Copyright treaty with the United Kingdom, as the case may be*) hereby declare that I am the proprietor of a (*book, map, chart, etc., as the case may be*) called (*title or name, as the case may be*), for which I hereby request the privilege of an Interim Copyright, to the terms of the Act, and for that purpose, I herewith forward the fee required by "The Copyright Act of 1875," together with a Copy of the title of the said (*book, map, chart, etc., as the case may be.*)

In testimony thereof I have signed in the presence of the two undersigned witnesses, at the place and date herewith mentioned.

(*Place and date.*)

(*Signature of the Proprietor.*)

Signature of the two witnesses. }

8. OF AN ENTIRE INTEREST (OR AN UNDIVIDED ONE-HALF INTEREST) IN AN INVENTION BEFORE THE ISSUE OF PATENT.

(See Patent Act of 1872, 35 Vic. cap. 26 D.)

In consideration of the sum of to me paid by of the I do hereby sell and assign to the said all (or an undivided half of all) my right, title and interest in and to my invention for new and useful improvements on as fully set forth and described in the specification which I have signed preparatory to obtaining a patent. And I do hereby authorize and request the Commissioner of Patents to issue the said patent to the said (or jointly to myself and the said) in accordance with this assignment.

Witness my hand and seal this day of one thousand eight hundred and at the

[L.S.]

9. OF AN ENTIRE INTEREST IN A PATENT.

In consideration of to me paid by of I do hereby sell and assign to the said all my right, title and interest in and to the Patent of Canada, No. for an improvement in granted to me the same to be held by and enjoyed by the said to the full end of the term for which said patent is granted, as fully and entirely as the same could be held and enjoyed by me if this assignment and sale had not been made.

Witness my hand and seal this day of one thousand eight hundred and at

[L.S.]

10. FORM OF SURRENDER TO BE WRITTEN ON THE ORIGINAL PATENT.

To all whom these presents shall come, of the of in the Province of within named, sends greeting:—

WHEREAS the within written patent, for an improvement on is deemed defective or inoperative by reason of insufficient description or specification, and the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, and the Commissioner of Patents, accordingly, in pursuance of the Statute in such respect, hath agreed to accept a surrender of the same.

Now know ye that the said , within named, doth, by these presents, surrender and yield up the within written patent, granted to him, for improvements on and bearing date the day of 18 .

In witness whereof the said hath set his hand and affixed his seal, this day of A.D., 18 .

[L.S.]

11. TRADE MARKS.

See as to Trade Marks and Industrial Designs 42 Vic. cap. 22 D.

An application for the registration of a *General* Trade Mark shall be made in duplicate after the following form :—

To the Minister of Agriculture,
(Trade Mark and Copyright Branch,)
Ottawa.

I (*name of person*), of the (*city, town, or other locality, as the case may be*), in (*name of County, Province or State, as the case may be,*) hereby furnish a duplicate copy of a general trade mark, in accordance with sections 9 and 10 of "The Trade Mark and Design Act of 1879," which I verily believe is mine, on account of having been the first to make use of the same (*or on account of having acquired it from* (*naming the person*), *whom I verily believe to be the original proprietor thereof.*)

The said *general* trade mark consists (*here must be inserted a description of the trade mark, recital of the motto or mottoes, etc., etc., in order to explain the pattern furnished*), and I hereby request the said *general* trade mark to be registered in accordance with the law.

I forward, herewith, the fee of $30, in accordance with section 12 of the said Act.

In testimony thereof, I have signed in the presence of the two undersigned witnesses, at the place and date hereunder mentioned.

(*Place and date*).

(*Signature of the proprietor.*)

(*Signature of the two witnesses.*)

12. INDUSTRIAL DESIGNS.

An application for the registration of an Industrial Design shall be made *in duplicate* after the following form :—

To the Minister of Agriculture,
(Trade Mark and Copyright Branch),
Ottawa,

I (*name of the person*), being a resident of Canada, and now residing in the (*city, town, or other locality, as the case may be,*) in the (*name of the*

[illegible]

[illegible]

[illegible]

CHAPTER VIII.

PERSONAL PROPERTY.

As to sales of goods between the parties, see 29 Car. II. cap. 3, sec. 17, Lord Tenterden's Act, 9 Geo. IV. cap. 14, R. S. O. cap. 117.

1. GIFT OF PERSONAL PROPERTY (CHOSES IN POSSESSION.)

THIS INDENTURE made between A.. of the one part, and B., of the other part.

WHEREAS (*setting out the reason and reality of the gift*).

Now, this indenture witnesseth, that in pursuance of his said desire, and in consideration of his natural love and affection for the said B., he, the said A., doth hereby give and assign unto the said B.,

ALL and every the goods, chattels and effects in the schedule hereunto annexed, marked A.

Together with full power and authority for the said B. and his assigns, to enter into and upon any dwelling house, lands and hereditaments, for the time being, belonging to or occupied by the said A., in or upon which any property comprised in or assigned by this indenture, shall be, or be supposed to be, and stay therein or upon, and return therefrom to inspect and take an inventory or inventories of the properties and effects hereby assigned, and to remove the same at his or their pleasure.

AND, the said A. doth hereby, for himself and his heirs, covenant with the said B., that he, the said A., hath full power to assign and give the said goods and chattels hereby assigned in manner aforesaid,

AND that it shall be lawful for the said B. and his assigns to take hold and enjoy the same free from any disturbance or hindrance whatever, and *that* free from any encumbrance.

IN WITNESS, etc.

2. SALE OF GOODS.

Memorandum of agreement between A., of of the one part, and B., of of the other part.

The said A. agrees to sell, and the said B. agrees to buy, the goods hereunder mentioned, the property of said A., for the price or sum of $

Signed, A.
Signed, B.

Schedule.

or

To buy six hogsheads of sugar, the property of the said A., now lying in bond at in the name of the said A., for the sum of $

To be delivered within three months, on tender of the price and duty.

Signed, A.
Signed, B.

CONVEYANCES UNDER THE REVISED STATUTE.

See R. S. O. cap. 119; 41 Vic. cap. 8; 43 Vic. cap. 15; 44 Vic. cap. 12 —all amending the Revised Statute.

1. BILL OF SALE OF CHATTELS.

THIS INDENTURE, etc.,
between bargainor, and bargainee:
WHEREAS the said is possessed of the hereinafter set forth, described and enumerated, and hath contracted and agreed with for the absolute sale to of the same, for the sum of . NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of of lawful money of Canada, paid by the to the said , at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) the said ha bargained, sold, assigned, transferred and set over, and by these presents do bargain, sell, assign, transfer and set over unto the said executors, administrators and assigns, ALL THOSE, the said and all the right, title, interest, property, claim and demand whatsoever, both at law and in equity, or otherwise howsoever, of the said of, in, to, and out of the same, and every part thereof; TO HAVE AND TO HOLD the said hereinbefore assigned and every of them and every part thereof, with the appurtenances, and all the right, title and interest of the said thereto and therein, as aforesaid, unto and to the use of the said , executors, administrators and assigns, to and for sole and only use FOR EVER; AND the said do hereby, for heirs, executors and administrators, COVENANT, PROMISE and agree with the said , executors and administrators, in manner following, that is to say: THAT the said now rightfully and absolutely possessed of and entitled to the said hereby assigned and every of them, and every part thereof; AND that the said now ha in good

right to assign the same unto the said executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; AND that the said executors, administrators and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, possess and enjoy the said hereby assigned and every of them, and every part thereof, to and for own use and benefit, without any manner of hindrance, interruption, molestation, claim or demand whatsoever, of, from or by the said or any person or persons whomsoever: AND that free and clear, and freely and absolutely released and discharged, or otherwise, at the cost of the said effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges and encumbrances whatsoever: AND moreover, that the said and all persons rightfully, claiming or to claim any estate, right, title or interest of, in or to the said hereby assigned and every of them, and every part thereof, shall and will from time to time, and at all times hereafter upon every reasonable request of the said executors, administrators or assigns, but at the cost and charges of the said make, do and execute, or cause or procure to be made, done and executed, all such further acts, deeds and assurances for the more effectually assigning and assuring the said hereby assigned unto the said executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said executors, administrators or assigns, or his counsel shall be reasonably advised or required,

In witness, etc.

Signed, sealed, etc.

COUNTY OF
TO WIT: } I, (the bargainee) in the foregoing bill of sale named, make oath and say: THAT the sale therein made is *bona fide*, and for good consideration, namely:— and not for the purpose of holding or enabling me, this deponent, to hold the goods mentioned therein against the creditors of the said bargainor.

SWORN before me at
in the County of
this day of
A.D, 18 .

A Commissioner, etc.

---

2. CHATTEL MORTGAGE.

THIS INDENTURE, made the day of 18 , between A. B., of, etc., and C. D., of etc.

WITNESSETH that the said for and in consideration of the sum of $, of lawful money of Canada, to him in hand well and truly paid by the said at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth bargain, sell and assign unto the said his executors, administrators and assigns, all and every the goods, chattels, furniture and effects in and about the dwelling house (*or store*) of the said A. B., situate at, etc., and hereinafter particularly mentioned, that is to say: (*Here specify the chattels: or you may refer to a schedule, saying after the word, etc., "which are particularly specified in the schedule hereunder written."*)

To have, receive and take the said goods and chattels hereby assigned, or intended so to be, unto the said his executors, administrators and assigns, as his and their own proper goods and effects.

Provided always, that if the said his executors or administrators, shall pay unto the said his executors, administrators or assigns, the full sum of $ with interest thereon at the rate of per cent., on the day of next, then these presents shall be void.

And the said doth hereby, for himself, his executors and administrators, covenant, promise and agree to and with the said, the his executors administrators and assigns, that he said his executors or administrators, or some or one of them, shall and will well and truly pay, or cause to be paid, unto the said his executors, administrators and assigns, the said sum of money in the above proviso mentioned, with interest for the same as aforesaid, on the days and times, and in the manner above limited for the payment thereof.

And also, that in case default shall be made in the payment of the said sum of money in the said proviso mentioned, or the interest thereon, or any part thereof, or in case the said shall attempt to sell or dispose of, or in any way part with the possession of, the said goods and chattels, or any of them, or to remove the same or any part thereof out of the without the consent of the said his executors, administrators and assigns, to such sale, removal or disposal thereof, first had and obtained in writing; then, and in such case, it shall and may be lawful for the said his executors, administrators and assigns, peaceably and quietly to receive and take unto his or their absolute possession, and thenceforth to hold and enjoy all and every or any of the goods, chattels and premises hereby assigned, or intended so to be, and with his or their servant or servants, and with such other assistant or assistants as he may require, at any time

during the day to enter into and upon any lands, tenements, houses and premises belonging to and in the occupation of the where the said goods and chattels, or any part thereof, may be, and to break and force open any door, lock, bolt, fastening, hinge, gate, fence, house, building, enclosure and place, for the purpose of taking possession of and removing the said goods and chattels; and to sell the said goods and chattels, or any of them, or any part thereof, at public auction or private sale, as to them, or any of them, may seem meet; and from and out of the proceeds of such sale, in the first place, to pay and reimburse himself or themselves all such sums of money as may then be due, by virtue of these presents, and all such expenses as may have been incurred by the said his executors, administrators and assigns, in consequence of the default, neglect or failure of his executors, administrators and assigns, in payment of the said sum of money, with interest thereon, as above mentioned, or in consequence of such sale or removal as above mentioned; and, in the next place, to pay unto the said his executors, administrators and assigns, all such surplus as may remain after such sale, and after payment of all such sum and sums of money, and interest thereon, as may be due by virtue of these presents at the time of such seizure, and after payment of the costs, charges, and expenses incurred by such seizure and sale as aforesaid.

And the said doth hereby further covenant, promise and agree to and with the said his executors, administrators and assigns, that in case the sum of money realized under such sale, as above mentioned, shall not be sufficient to pay the whole amount due at the time of such sale, then he, the said his executors or administrators, will forthwith pay any deficiency to the said his executors, administrators and assigns.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

A. B. [L.S.]

Signed, sealed and delivered,
in the presence of

Y. Z.

Affidavit of Mortgagee.

Ontario, County of , to wit: I, C. D., of the of in the County of the mortgagee in the within Bill of sale, by way of mortgage named, make oath and say, that A. B., the mortgagor in the within Bill of Sale, by way of mortgage named, is justly and truly indebted to me, this deponent C. D., the mortgagee therein named, in the sum of $ mentioned therein. That the said Bill of Sale, by way of mortgage, was executed in good faith,

and for the express purpose of securing the payment of the money so justly due, as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said Bill of Sale, by way of mortgage, against the creditors of the said A. B., the mortgagor therein named, or preventing the creditors of such mortgagor from obtaining payment of any claim against him.

C. D.

Sworn before me, at the
of in the County
of this
day of 18 .
E. F.

A Commissioner, etc.

---

3. CHATTEL MORTGAGE BY WAY OF SECURITY AGAINST ENDORSEMENT.

(*Preliminary parts as before.*)

WHEREAS the said has endorsed a promissory note of the said for the sum of $500, of lawful money of Canada, for the accommodation of the said which promissory note is in the words and figures following, that is to say: (*here copy the note.*) And WHEREAS the said has agreed to enter into these presents for the purpose of indemnifying and saving harmless the said of and from the payment of the said promissory note, or any part thereof, or any note or notes hereafter to be indorsed by the said for the accommodation of the said by way of renewal of the said recited note, or otherwise howsoever, within the period of one year from the date hereof.

The proviso should be in the following form :—

Provided always, and these presents are upon this condition, that if the said his executors or administrators, do and shall well and truly pay, or cause to be paid, the said promissory note so as aforesaid indorsed by the said and all and every other note or notes, which may hereafter be indorsed by the said for the accommodation of the said by way of renewal of the said note and indemnify and save harmless the said his heirs, executors and administrators, from all loss, costs, charges, damages or expenses in respect of the said note or any renewals thereof, then these presents, and every matter and thing herein contained, shall cease, determine and be utterly void to all intents and purposes, any thing herein contained to the contrary thereof in any wise notwithstanding.

The covenants refer throughout to the payment of the note or to the renewals thereof, and can easily be adapted from the foregoing precedent.

The affidavit of the mortgagee is to the effect that such mortgage truly states the extent of the liability intended to be created and covered by such mortgage, and to secure the mortgagee against payment of the note, etc.

---

4. CHATTEL MORTGAGE—FUTURE ADVANCES.

(Recite fully the terms, nature and effect of the agreement for future advances, and the extent of the liability to be incurred; then the agreement to advance a certain sum to the mortgagor, with times of repayment, etc. The other parts of the mortgage and the affidavit call for no special remark.)

---

5. DISCHARGE OF CHATTEL MORTGAGE.

DOMINION OF CANADA,
Province of Ontario.

To the Clerk of the County Court of the Count of
I do certify, that ha satisfied all money due on or to grow due on a certain CHATTEL MORTGAGE made by to which Mortgage bears date the day of A.D. 18 , and was registered in the Office of the Clerk of the County Court of the Count of on the day of A.D. 18 , as No. that such Chattel Mortgage has been assigned, and that I am the person entitled by law to receive the money, and that such Mortgage is therefore discharged.

Witness my hand this day of A.D. 18

Witness

Residence.
Occupation.

(Usual affidavit of execution to be added.)

---

6. STATEMENT FOR A RENEWAL OF CHATTEL MORTGAGE.

Statement exhibiting the interest of C. D. in the property mentioned in a chattel mortgage, dated the day of 18 , made between A. B. of of the one part, and C. D. of the of the other part, and filed in the Office of the Clerk of the County Court of the County of on the day of 18 , and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said C. D. is still the mortgagee of said property, and has not assigned the said mortgage, *(or* the said E. F. is the assignee of the said mortgage, by virtue of an assignment thereof from the said C. D. to him, dated the day of 18), *(or, as the case may be)*. No

payments have been made on account of the said mortgage (*or*, the following payments and no other have been made on account of the said mortgage:

1880.

January 1st. Cash received $100).

The amount still due for principal and interest on the said mortgage is the sum of $, computed as follows:—

(Here give the computation.)

C. D.

SALES AND MORTGAGES OF VESSELS.

See the Merchant Shipping Act of 1854 (Imp.), 17 & 18 Vic. cap. 104; C. S. C. cap. 41; 36 Vic. cap. 128, D.

The necessary forms for mortgages and sales of registered vessels may be had at the Custom House of any port, and need not be set out here. The Dominion Statute above referred to, gives some of the prescribed forms.

CHAPTER IX.

WILLS.

(See R. S. O. cap. 106.)

1. SHORT FORM OF WILL.

This is the last will and testament of me, A. B.. of etc., made this day of in the year of our Lord one thousand eight hundred and .

I., A. B., of in the county of gentleman, being of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

1st. I hereby constitute and appoint my wife, E. B., to be sole executrix of this my last will, directing my said executrix to pay all my just debts and funeral expenses, and the legacies hereinafter given, out of my estate.

2nd. After the payment of my said debts and funeral expenses, I give to each of my children the sum of dollars, to be paid to each of them as soon after my decease, but within one year, as conveniently may be done.

3rd. And for the payment of the legacies aforesaid, I give and devise to my said executrix all the personal estate owned by me at my decease (except my household furniture and wearing-apparel), and so much of my real estate as will be sufficient, in addition to the said personal estate herein given, to pay the said legacies,

4th. I give to my said executrix all my household furniture and wearing-apparel for her sole use.

5th. I devise to my said executrix all the rest and residue of my real estate, as long as she shall remain unmarried, and my widow, with remainder thereof, on her decease or marriage, to my said children and their heirs respectively, share and share alike.

In witness whereof, I have hereunto set my hand to this my last will and testament.

A. B.
(Testator.)

Signed by the testator as and for his last will and testament, in the presence of us, who, in his presence and at his request, and in presence of each other, have hereunto subscribed our names as witnesses.

C. D., Merchant.
E. F., Clerk.
(Witnesses.)

2. CODICIL TO A WILL.

This is a codicil to the last will and testament of me, A. B.. of, etc., bearing date the day of , A.D. 18 , (*the date of the will.*)

I do hereby revoke the bequest to my son John, and do give and bequeath the same to my daughter Jane, to and for her own absolute use and benefit forever.

In all other respects I do confirm my said will.

In witness whereof, I have hereunto set my hand this day of , A.D. 18 .

A. B.

Signed, published and declared by the said A. B., the testator, as and for the codicil to his last will and testament, in the presence of us, who, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses to the due execution hereof.

R. S., Merchant.

X. Z., Clerk.

(*Witnesses.*)

---

3. RESIDUARY DEVISE.

And as to all the residue of my real and personal estate and effects, of whatever description and wheresoever situate, I give, devise and bequeath the same unto heirs, executors, administrators and assigns, according to the natures and tenures thereof.

---

4. DEVISE OF TRUST ESTATES.

I devise all estates vested in me as mortgagee or trustee unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns respectively, subject to the equities and trusts affecting the same respectively, and, so far as I am beneficially interested as mortgagee, to be disposed of as part of my personal estate for the purposes of my will.

APPENDIX.

R. S. O. CAP. 102.

An Act respecting Short Forms of Conveyances.

HER Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Wherever the words following occur in this Act, or in the Schedules thereto, they shall be construed in the manner hereinafter mentioned, unless there is something in the subject or context repugnant to such construction:

1. "Lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, or any undivided part or share therein, respectively; and

2. "Party" shall mean and include any body politic *or* corporate or collegiate as well as an individual.

2. Where a *deed* made according to the forms set forth in Schedule A annexed to this Act, or any other deed expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in column one of Schedule B, *hereto annexed*, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the same Schedule B, and distinguished by the same number as is annexed to the form of words used in the deed; but it shall not be necessary, in any such deed, to insert any such number.

3. Any *deed* or part of a *deed* which fails to take effect by virtue of this Act, shall, nevertheless, be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

4. Every such *deed*, unless an exception is specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and en-

R. S. O. CAP. 104.

An Act respecting Short Forms of Mortgages.

HER Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Wherever the words following occur in this Act or in the Schedules thereto, they shall be construed in the manner hereinafter mentioned, unless there is something in the subject or context repugnant to such construction;

1. "Lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, or any undivided part or share therein respectively; and

2. "Party" shall mean and include any body politic, corporate or collegiate as well as an individual.

2. Where a mortgage *of real property in Ontario*, made according to the forms set forth in the Schedule A annexed to this Act, or any other *such mortgage* expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms or words contained in column one of Sehedule B *to this Act*, and distinguished by any number therein, such mortgage shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the same Schedule B, and distinguished by the same number as is annexed to the form of words used in *such* mortgage; but it shall not be necessary in any such *mortgage* to insert any such number.

3. Any *such* mortgage or part of *such* mortgage which fails to take effect by virtue of this Act shall, nevertheless, be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

4. Every such mortgage, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water-courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands therein comprised belonging, or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof, and if the same purports to convey an estate in fee, also the reversion *and*

joyed, or taken or known as part or parcel thereof; and if the same purports to convey an estate in fee, also the reversion *or* reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, *both* at law and in equity, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances.

5. In taxing any bill for preparing and executing any deed under this Act, the Taxing Officer, in estimating the proper sum to be charged therefor, shall consider not the length of such deed, but the skill and labour employed and responsibility incurred in the preparation thereof.

6. The Schedules hereto, and the directions and forms therein contained, shall be deemed parts of this Act.

SCHEDULE A.—SECTION 2.

FORM OF DEED.

This Indenture, made the day of , one thousand eight hundred and , in pursuance of the Act respecting Short Forms of *Conveyances* between (*here insert names of parties and recitals, if any,*) Witnesseth that in consideration of dollars, of lawful money of Canada, now paid by the said (grantee *or* grantees) to the said (grantor *or* grantors) (the receipt whereof is hereby by him (*or* them) acknowledged,) he (*or* they) the said (grantor *or* grantors) doth (*or* do) grant unto the said (grantee *or* grantees) his (*or* their) heirs and assigns for ever, all, etc. (*parcels.*) (*Here insert covenants or any other provisions.*)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

SCHEDULE B.—SECTION 2.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the first column of this Schedule may substitute for the words "covenantor" or "covenantee," or "releasor" or "releasee," "grantor" or "grantee," any name or names, and in every such case, corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

reversions, remainder and remainders, yearly and other rents, issues and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever at law and in equity of the grantor in, to, out of or upon the same lands and every part and parcel thereof, with their and every of their appurtenances, *subject always to the reservations, limitations, provisos and conditions, contained in the grant of such lands from the Crown.*

6. In taxing any bill for preparing and executing any mortgage under this Act, the Taxing Officer, in estimating the proper sum to be charged therefor, shall consider not the length of such mortgage, but the skill and labour employed and responsibility incurred in the preparation thereof.

6. The Schedules hereto, and the directions and forms therein contained, shall be deemed parts of this Act.

SCHEDULE A.—SECTION 2.

FORM OF MORTGAGE.

This Indenture, made the day of one thousand eight hundred and , in pursuance of the Act respecting short forms of mortgages, between (*here insert names of parties and recitals, if any,*) witnesseth, that in consideration of of lawful money of Canada, now paid by the said (mortgagee *or* mortgagees) to the said (mortgagor *or* mortgagors,) the receipt whereof is hereby acknowledged, the said (mortgagor *or* mortgagors) doth (*or* do) grant and mortgage unto the said (mortgagee *or* mortgagees) his (her *or* their) heirs and assigns for ever, all (*parcels*) (*here insert provisoes, covenants or other provisions.*)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

SCHEDULE B.—SECTION 2.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "mortgagor or mortgagors," or "mortgagee or mortgagees," any name or names; and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the first column of this schedule; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into, or annex to, any of the forms in the first column, any express exceptions from, or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. *Such parties may add the name or other designation of any person or persons, or class or classes of persons, or any other words, at the end of form two of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons, or class or classes of persons, or of all persons whomsoever; and in every such case the covenants two, three and four, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons so named.*

FORMS OF COVENANTS.

COLUMN ONE.	COLUMN TWO.
1. The said (*covenantor*) covenants with the said (*covenantee.*)	1. And the said *covenantor* doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, *with and to* the said *covenantee*, his heirs and assigns, in manner following, that is to say:
2. That he has the right to convey the said lands to the said (*covenantee*) *notwithstanding any act of the said* (*covenantor.*)	2. That *for and notwithstanding any act, deed matter or thing by the said covenantor, done, executed, committed, or knowingly or wilfully permitted or suffered to the contrary*, he, the said *covenantor*, now hath in himself good right, full power, and absolute authority, to convey the said lands and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent of these presents.

3. Such parties may introduce into, or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

FORMS OF COVENANTS, ETC.

COLUMN ONE.	COLUMN TWO.
3. The said mortgagor covenants with the said mortgagee.	3. And the said mortgagor doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said mortgagee, his heirs and assigns, in manner following, that is to say:
4. That the mortgagor will pay the mortgage money and interest, and observe the above proviso.	4. That the said mortgagor, his heirs, executors, administrators or some, or one of them shall, and will, well and truly pay, or cause to be paid, unto the said mortgagee, his heirs, executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest for the same, as aforesaid, at the days and times, and in the manner above limited for payment thereof, and shall, and will in everything, well, faithfully and truly do, observe, perform, fulfil and keep all and singular the provisions, agreements and stipulations in the said above proviso, particularly set forth, according to the true intent and meaning of these presents, and of the said above proviso.
5. That the mortgagor has a good title in fee simple to the said lands.	5. And also, that the said mortgagor, at the time of the sealing and delivery hereof, is, and stands solely, rightfully and lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheritance, in fee simple of, and in the lands, tenements, hereditaments, and all and singular other the premises hereinbefore described, with their, and every of their appurtenances, and of, and in every part and parcel thereof, without any manner of trusts, reservations, limitations, provisos or conditions, except those contained in the original grant thereof from the Crown, or any other matter or thing to alter, charge, change, encumber or defeat the same.
6. And that he has the right to	6. *And also*, that the said mortgagor now hath in himself good right, full power, and lawful and absolute

COLUMN ONE.	COLUMN TWO.
3. And that the said (*covenantee*) shall have quiet possession of the said lands.	3. And that it shall be lawful for the said *covenantee*, his heirs and assigns, *from time to time, and at all times hereafter*, peaceably and quietly to enter *upon*, have, hold, occupy, possess and enjoy the said land and premises hereby conveyed, or intended so to be, with their and every of their appurtenances; *and to have, receive, and take the rents, issues and profits thereof, and of every part thereof, to and for his and their use and benefit*, without *any* let, suit, *trouble*, denial, *eviction*, interruption, *claim or demand whatsoever of, from, or by* him, the said covenantor, *or* his heirs, or any person *claiming, or to claim, by, from, under, or in trust for him, them, or any of them.*
4. Free from all encumbrances.	4. And that free and clear, and freely and *absolutely* acquitted, exonerated, and *for ever* discharged, *or otherwise by the said covenantor, or his heirs, well and sufficiently saved, kept harmless and indemnified of, from and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognisance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble and incumbrance whatsoever, made, executed, occasioned, or suffered by the said covenantor, or his heirs, or by any person claiming, or to claim, by, from, under, or in trust for him, them, or any of them.*
5. And the said (*covenantor*) *covenants with the said* (*covenantee*) *that he* will execute such further assurances of the said lands as may be requisite.	5. *And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant promise and agree with, and to the said covenantee, his heirs and assigns, that he*, the said covenantor, his heirs, *executors and administrators*, and all and every other person, whosoever, having or claiming, or who shall or may *hereafter* have or claim, any estate, right title *or* interest *whatsoever, either at law or in equity*, in, to, or out of, the *said* lands and premises hereby conveyed, or intended so to be, *or any of them*, or any part thereof, by, from, under, or in trust for him, *them, or any of them*, shall and will, from time to time, and at all times *hereafter, upon every reasonable request, and* at

COLUMN ONE. COLUMN TWO.

convey the said lands to the said mortgagee.

authority to convey the said lands, *tenements, hereditaments* and *all and singular* other the premises hereby conveyed, or *hereinbefore mentioned* or intended so to be, with their and every of their appurtenances unto the said mortgagee, *his heirs and assigns*, in manner aforesaid, and according to the true intent *and meaning* of these presents.

7. And that *on default* the mortgagee shall have quiet possession of the said lands.

7. And *also, that from and after default shall happen to be made of or in the payment of the said sum of money in the said above proviso mentioned, or the interest thereof, or any part thereof, or of, or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso, particularly set forth, contrary to the true intent and meaning of these presents, and of the said proviso, then, and in every such case it shall and may be lawful to and* for the said mortgagee, his heirs and assigns, peaceably and quietly to enter *into*, have, hold, *use*, occupy, possess and enjoy the *aforesaid* lands, tenements, hereditaments and premises hereby conveyed or mentioned or intended so to be, with their appurtenances, without *the* let, suit, hindrance, interruption or denial of him, the said mortgagor, his heirs or assigns, *or any other person or persons whomsoever.*

8. Free from all encumbrances.

8. And that free and clear and freely and *clearly* acquitted, exonerated and discharged *of and from all arrears of taxes and assessments whatsoever, due or payable upon or in respect of the said lands, tenements, hereditaments and premises, or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, judgments, executions and recognizances, and of and from all manner of other charges or incumbrances whatsoever.*

9. And that the said mortgagor will execute such further assurances of the said lands as may be requisite.

9. *And also, that from and after default shall happen to be made of or in the payment of the said sum of money, in the said proviso mentioned, or the interest thereof, or any part of such money or interest, or of or in the doing, observing, performing, fulfilling or keeping of some one or more of the provisions, agreements or stipulations in the said above proviso particularly set forth, contrary to the true intent and meaning of these presents and of the said proviso, then, and in every such case,* the said mortgagor, his heirs *and assigns*, and all and every other person *or persons* whosoever, having, or *lawfully* claiming, or who shall or may have or *lawfully* claim, any estate, right, title interest, *or*

COLUMN ONE. COLUMN TWO.

the costs and charges of the said covenantee, his heirs *or* assigns, make, do, execute, or cause to be made, done or executed, all such further and other *lawful* acts, deeds, *things*, devices, conveyances and assurances in the law *whatsoever*, for the *better*, more perfectly, and absolutely conveying and assuring the said lands and premises *hereby conveyed, or intended so to be, and every part thereof*, with *their* appurtenances, unto the said covenantee, his heirs and assigns, *in manner aforesaid*, as by the said covenantee, his heirs and assigns, his or their counsel in the law, shall be reasonably devised, advised or required, *so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors and administrators, only*, and so as no person who shall be required to make or execute such assurances, shall be compellable, for the making or executing thereof, to go or travel from his usual place of abode.

6. *And the said (covenantor) covenants with the said (covenantee)* that he will produce the title deeds enumerated hereunder, and allow copies to be made *of them*, at the expense of the *said (covenantee.)*

6. *And the said covenantor doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said covenantee, his heirs and assigns, that* the said covenantor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request, costs and charges of the said covenantee, his heirs or assigns, *or his or their attorney, solicitor, agent, or counsel*, at any trial or hearing in any action or suit at law or in equity, or other judicature, or otherwise, as occasion shall require, produce all *and* every or any deed, instrument or writing hereunder written, for the manifestation, defence and support of the estate, title and possession of the said covenantee, his heirs and assigns, in, *or* to, the said lands and premises hereby conveyed, or intended so to be, and at the like request, costs and charges, shall and will make and deliver, or cause to be made and delivered, true and attested, or other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds, by the said covenantee, his heirs and assigns, *or such person as he or they shall for that purpose direct and appoint.*

COLUMN ONE. COLUMN TWO.

trust of, in, to, or out of the lands, *tenements*, *hereditaments* and premises hereby conveyed *or mentioned*, or intended so to be, *with the appurtenances*, or any part thereof, by, from, under, or in trust for him, *the said mortgagor*, shall and will, from time to time, and at all times *thereafter*, at the *proper* costs and charges of the said mortgagee, his heirs *and* assigns make, do, *suffer and* execute, or cause *or procure* to be made, done *suffered and* executed, all *and every* such further and other *reasonable act or* acts, *deed or* deeds, devices, conveyances and assurances in the law for the *further*, better, *and* more perfectly and absolutely conveying and assuring the said lands, *tenements*, *hereditaments* and premises with *the* appurtenances unto the said mortgagee, his heirs and assigns, as by the said mortgagee, his heirs and assigns, *or* his or their counsel *learned* in the law, shall *or may* be *lawfully and* reasonably devised, advised or required, so as no person who shall be required to make or execute such assurances, shall be compelled, for the making or executing thereof, to go or travel from his usual place of abode.

10. And also that the said mortgagor will produce the title deeds enumerated hereunder and allow copies to be made, at the expense of the mortgagee.

10. And *also that* the said mortgagor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time, and at all times hereafter, at the request *and proper* costs and charges *in the law* of the said mortgagee, his heirs or assigns, at any trial or hearing in any action or suit at law, or in equity or other judicature, or otherwise, as occasion shall require, produce all, every or any deed, instrument or writing hereunder written for the manifestation, defence and support of the estate, title and possession of the said mortgagee, his heirs and assigns, *of*, *in*, *to or out of* the said lands, *tenements*, *hereditaments* and premises hereby conveyed *or mentioned*, or intended so to be, and at the like request, costs and charges, shall and will make and deliver, or cause *or procure* to be made and delivered *unto the said mortgagee, his heirs and assigns*, true and attested, or other copies or abstracts of the same deeds, instruments and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said mortgagee, his heirs and assigns.

COLUMN ONE.	COLUMN TWO.
7. *And* the said (*covenantor*) *covenants with the said* (*covenantee*) *that he* has done no act to encumber the said lands.	7. *And the said covenantor, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said covenantee, his heirs and assigns, that he* hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby conveyed, or intended so to be, or any part or parcel thereof, are, is, or shall or may be in any wise impeached, charged, affected, or encumbered in title, estate or otherwise howsoever.
8. And the said (*releasor*) releases to the said (*releasee*) all his claims upon the said lands.	8. And the said releasor hath released, remised, and forever quitted claim, and by these presents doth release, remise, and forever quit claim, unto the said releasee, his heirs and assigns, all and all manner of right, title, interest, claim, and demand whatsoever, both at law and in equity, *in, to,* and out of the said lands and premises hereby *granted*, or intended so to be, and every part and parcel thereof, so as that neither he nor his heirs, executors, administrators, or assigns, shall nor may, at any time hereafter, have, claim, pretend to, challenge, or demand the said lands and premises, or any part thereof, in any manner howsoever, but the said releasee, his heirs and assigns, and the *same* lands and premises shall from

COLUMN ONE.	COLUMN TWO.
11. And that the said mortgagor has done no act to encumber the said lands.	11. And also that the said mortgagor hath not at any time heretofore made. done, committed, executed or wilfully or knowingly suffered any act, deed, matter, or thing whatsoever, whereby, or by means whereof, the said lands, *tenements, hereditaments* and premises hereby conveyed *or mentioned*, or intended so to be, or any part or parcel thereof, are, is or shall, or may be in any wise impeached, charged, affected or encumbered in title, estate or otherwise howsoever.
12. And that the said mortgagor will insure the buildings on the said lands to the amount of not less than currency.	12. And also that the said mortgagor, or his heirs, shall and will forthwith insure, unless already insured, and during the continuance of this security, keep insured against loss or damage by fire, in such proportions upon each building as may be required by the said mortgagee, his heirs or assigns, the messuages and buildings erected on the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, in the sum of of lawful money of Canada, at the least, in some insurance office, to be approved of by the said mortgagee, his heirs or assigns, and pay all premiums and sums of money necessary for such purpose, as the same shall become due, and will on demand assign, transfer and deliver over unto the said mortgagee, his heirs, executors, administrators or assigns, the policy or policies of assurance, receipt and receipts thereto appertaining, and if the said mortgagee, his heirs or assigns shall pay any premiums or sums of money for insurance of the said premises or any part thereof, the amount of such payments shall be added to the debt hereby secured and shall bear interest at the rate from the time of such payments, and shall be payable at the time appointed for the then next ensuing payment of interest on the said debt.
13. And the said mortgagor *doth* release to the said mortgagee all his claims upon the said lands *subject to the said proviso.*	13. And the said mortgagor hath released, remised and forever quitted claim, and by these presents doth release, remise, and for ever quit claim unto the said mortgagee, his heirs and assigns, all and all manner of right, title, interest, claim and demand whatsoever, both at law and in equity, *of, unto* and out of the said lands, *tenements, hereditaments*, and premises hereby *conveyed or mentioned*, or intended so to be, and every part and parcel thereof, so as that neither the said mortgagor, his heirs, executors, administrators or assigns, shall or may at any time hereafter have claim, pretend to, challenge or demand the said lands, *tenements, hereditaments* and premises, or any part thereof, in any manner howsoever, *subject always to the*

COLUMN ONE.	COLUMN TWO.
	henceforth for ever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said releasor might or could have upon him in respect of the said lands, or upon the said lands.
9. And the said (A. B.) wife of the said (*grantor*) hereby bars her dower in the said lands.	9. And the said (A. B.,) wife of the said (*grantor*) for and in consideration of the sum of dollars, of lawful money of Canada, to her in hand paid by the said (*grantee*) at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said (*grantee*) his heirs and assigns, all her dower and right and title which in the event of her surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed, or intended so to be.

COLUMN ONE. COLUMN TWO.

said above proviso; but the said mortgagee, his heirs or assigns, and the *said* lands, *tenements, hereditaments* and premises, *subject as aforesaid*, shall from henceforth forever hereafter be exonerated and discharged of and from all claims and demands whatsoever, which the said mortgagor, *his heirs or assigns* might or could have upon the said mortgagee, *his heirs or assigns*, in respect of the said lands, *tenements hereditaments and premises*, or upon the said lands, *tenements, hereditaments and premises.*

1. And the said *(A. B.)* wife of the said mortgagor, hereby bars her dower in the said lands.

1. And the said (*A. B.*) wife of the said mortgagor, for and in consideration of the sum of of lawful money of Canada, to her in hand paid by the said mortgagee, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted and released, and by these presents doth grant and release unto the said mortgagee, his heirs and assigns, all her dower, and right and title which, in the event of surviving her said husband, she might or would have to dower, in, to, or out of the lands and premises hereby conveyed or intended so to be.

2. PROVIDED.—This mortgage to be void on payment of (*amount of principal money*) of lawful money of Canada, with interest at (*rate of interest*) per cent. as follows: (*terms of payment of principal and interest*) and taxes and performance of Statute labour.

2. Provided always, and these presents are upon this express condition, that if the said mortgagor, his heirs, executors, administrators or assigns, or any of them, do and shall, well and truly pay or cause to be paid unto the said mortgagee, his executors, administrators or assigns, the just and full sum of (*amount of principal money*) of lawful money of Canada, with interest thereon, at the rate of (*rate of interest*) per cent. per annum, on the days and times, and in manner following, that is to say (*terms of payment of principal and interest*) without any deduction, defalcation or abatement out of the same, for, or in respect of any taxes, rates, levies, charges, rents, assessments, statute labour or other impositions whatsoever already rated, charged, assessed or imposed, or hereafter to be rated, charged, assessed or imposed by authority of Parliament or of the Legislature, or otherwise, howsoever, on the said lands and tenements, hereditaments, and premises, with the appurtenances, or on the said mortgagee, his heirs, executors, administrators or assigns, in respect of the said premises, or of the said money or interest, or any other matter or thing relating to these presents, and until such default as aforesaid, shall and will, well and truly pay, do and perform, or cause or procure to be paid, done and performed, all matters and things in this proviso, hereinbefore set forth, then these presents, and everything in the same contained, shall be absolutely null and void.

COLUMN ONE.	COLUMN TWO.
14. Provided, that the said mortgagee on default of payment for months, may on notice enter on and lease or sell the said lands.	14. Provided always, and it is hereby declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators shall make default in any payment of the said money or interest or any part of either of the same, according to the true intent and meaning of these presents, and of the proviso in that behalf hereinbefore contained and calendar months shall have thereafter elapsed, without such payment being made (of which default, as also of the continuance of the said principal money and interest, or some part thereof, on this security, the production of these presents shall be conclusive evidence) it shall and may be lawful to and for the said mortgagee, his heirs or assigns, after giving written notice to the said mortgagor, his heirs or assigns, of his intention in that behalf, either personally or at his or their usual or last place of residence within the Province, not less than previous, without any further consent or concurrence of the said mortgagor, his heirs or assigns, to enter into possession of the said lands, tenements, hereditaments and premises hereby conveyed, or mentioned or intended so to be, and to receive and take the rents, issues and profits thereof, and whether in or out of possession of the same, to make any lease or leases thereof, or of any part thereof, as he shall think fit, and also to sell and absolutely dispose of the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, or any part or parts thereof, with the appurtenances by public auction or private contract, or partly by public auction and partly by private contract, as to him shall seem meet, and to convey and assure the same when so sold unto the purchaser or purchasers thereof, his heirs and assigns, or as he, she or they shall direct and appoint, and to execute and do all such assurances, acts, matters and things as may be found necessary for the purposes aforesaid, and the said mortgagee shall not be responsible for any loss which may arise by reason of any such leasing or sale as aforesaid, unless the same shall happen by reason of his wilful neglect or default; and it is hereby further agreed between the parties to these presents, that, until such sale or sales shall be made as aforesaid, the said mortgagee, his heirs, executors, administrators, or assigns shall and will stand and be possessed of and interested in the rents and profits of the said lands, tenements, hereditaments and premises in case he shall take possession of the same, on any default as aforesaid, and after

COLUMN ONE. COLUMN TWO.

such sale or sales shall stand and be possessed of and interested in the moneys to arise and be produced by such sale or sales or which shall be received by the mortgagee, his heirs or assigns, by reason of any insurance upon the said premises or any part thereof upon trust in the first place to pay and satisfy the costs and charges of preparing for and making sales, leases and conveyances as aforesaid and all other costs and charges, damages and expenses which the said mortgagee, his heirs, executors, administrators or assigns, shall bear, sustain or be put to for taxes, rent, insurances and repairs, and all other costs, and charges which may be incurred in aud about the execution of any of the trusts in him hereby reposed, and in the next place to pay and satisfy the principal sum of money and interest hereby secured or mentioned or intended so to be, or so much thereof as shall remain due and unsatisfied up to and inclusive of the day whereon the said principal sum shall be paid and satisfied; and after full payment and satisfaction of all such sums of money and interest as aforesaid, upon this further trust that the said mortgagee, his heirs, executors, administrators or assigns, do and shall pay the surplus, if any, to the said mortgagor, his executors, administrators or assigns, or as he shall direct and appoint, and shall also, in such event, at the request, costs and charges in the law of the said mortgagor, his heirs or assigns, convey and assure unto the said mortgagor, his heirs or assigns, or to such person or persons as he shall direct and appoint, all such parts of the said lands, tenements, hereditaments and premises as shall remain unsold for the purposes aforesaid, freed and absolutely discharged of and from all estate, lien, charge and incumbrance whatsoever by the said mortgagee, his heirs and assigns, in the meantime, so as no person who shall be required to make or execute any such assurances, shall be compelled for the making thereof to go or travel from his usual place of abode; provided always, and it is hereby further declared and agreed by and between the parties to these presents, that notwithstanding the power of sale, and other the powers and provisions contained in these presents, the said mortgagee, his heirs or assigns shall have and be entitled to his right of foreclosure of the equity of the redemption of the said mortgagor, his heirs and assigns, in the said lands, tenements, hereditaments and premises as fully and effectually as he might have exercised and enjoyed the same in case the power of sale and the other former provisos and trusts incident thereto had not been herein contained.

COLUMN ONE.	COLUMN TWO.
15. Provided that the mortgagee may distrain for arrears of interest.	15. And it is further covenanted, declared and agreed by and between the parties to these presents, that if the said mortgagor, his heirs, executors or administrators, shall make default in payment of any part of the said interest at any of the days or times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments and premises, or any part thereof, and by distress warrant, to recover by way of rent reserved, as in the case of a demise, of the said lands, tenements, hereditaments and premises, so much of such interest as shall, from time to time, be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.
16. Provided that in default of the payment of the interest hereby secured, the principal hereby secured shall become payable.	16. Provided always, and it is hereby further expressly declared and agreed by and between the parties to these presents, that if any default shall at any time happen to be made of or in the payment of the interest money hereby secured, or mentioned, or intended so to be, or any part thereof, then, and in such case, the principal money hereby secured or mentioned, or intended so to be, and every part thereof, shall forthwith become due and payable in like manner, and with like consequences and effects to all intents and purposes whatsoever, as if the time herein mentioned for payment of such principal money had fully come and expired, but that in such case the said mortgagor, his heirs and assigns, shall, on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered at law, or within such time as by the practice of equity, relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.
17. Provided, that until default of payment the mortgagor shall have quiet possession of the said lands.	17. And provided also, and it is hereby further expressly declared and agreed by and between the parties to these presents, that until default shall happen to be made of or in the payment of the said sum of money hereby secured or mentioned, or intended so to be, or the interest thereof, or any part of either of the same, or the doing, observing, performing, fulfilling or keeping some one or more of the provisions, agreements or stipulations herein set forth, contrary to the true intent and meaning of these presents, it shall and may be lawful to and for the said

COLUMN ONE.	COLUMN TWO.
	mortgagor, his heirs and assigns, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said lands, tenements, hereditaments and premises hereby conveyed or mentioned, or intended so to be, with their and every of their appurtenances, and receive and take the rents, issues and profits thereof to his own use and benefit, without let, suit, hindrance, interruption or denial of or by the said mortgagee, his heirs, executors, administrators or assigns, or of or by any person or persons whomsoever lawfully claiming, or who shall or may lawfully claim by, from, under or in trust for him, her, them or any or either of them.

R. S. O. CAP. 103.

An Act Respecting Short Forms of Leases.

HER Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Where a deed made according to the form set forth in Schedule A, annexed to this Act, or any other deed expressed to be made in pursuance of this Act, or referring thereto, contains any of the forms of words contained in column one of Schedule B, hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed as if it contained the form of words contained in column two of the said Schedule B, and distinguished by the same number as is annexed to the form of words used in the deed; but it shall not be necessary, in any such deed, to insert any such number.

2. Any deed or part of a deed, which fails to take effect by virtue of this Act, shall nevertheless be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made.

3. Every such deed, unless an exception is specially made therein, shall be held and construed to include all out-houses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever, to the lands and tenements therein comprised belonging or in any wise appertaining.

SCHEDULE A.—SECTION 1.

FORM OF LEASE.

This Indenture, made the day of , in the year of Our Lord one thousand eight hundred and in pursuance of the Act respecting short forms of leases between , of the first part, and , of the second part, Witnesseth, that in consider-

ation of the rents, covenants and agreements, hereinafter reserved and contained on the part of the said party (*or* parties) of the second part, his (*or* their) executors, administrators and assigns, to be paid, observed, and performed, he (*or* they) the said party (*or* parties) of the first part hath (*or* have) demised and leased, and by these presents do (*or* doth) demise and lease unto the said party (*or* parties) of the second part, his (*or* their) executors, administrators and assigns, all that messuage or tenement situate, (*or* all that parcel or tract of land situate) lying and being *(here insert a description of the premises with sufficient certainty.)*

To have and to hold the said demised premises for and during the term of , to be computed from the day of , one thousand eight hundred and and from thenceforth next ensuing and fully to be complete and ended.

Yielding and paying therefor yearly and every year during the said term hereby granted unto the said party (*or* parties) of the first part, his (*or* their) heirs, executors, administrators, or assigns, the sum of to be payable on the following days and times, that is to say: on, etc.,) the first of such payments to become due and be made on the day of next

---

SCHEDULE B.—SECTION 1.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular in the forms in the first column of the schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualification thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, the covenants and proviso shall be taken to be made with, and apply to, the lessor, his executors, administrators and assigns.

FORMS OF COVENANTS.

COLUMN ONE.	COLUMN TWO.
1. That the said (*lessee*) covenants with the said (*lessor*) to pay rent.	1. And the said lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said lessor, that he, the said lessee, his executors, administrators and assigns, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.
2. And to pay taxes.	2. And also will pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor on account thereof.
3. And to repair.	3. And also will, during the said term, well and sufficiently repair, maintain, amend and keep the said demised premises with the appurtenances, in good and substantial repair, and all fixtures and things thereto belonging, or which at any time during the said term shall be erected and made, when, where and so often as need shall be.
4. And to keep up fences.	4. And also will, from time to time, during the said term, keep up the fences or walls of or belonging to the said premises, and make anew any parts thereof that may require to be new-made in a good and husbandlike manner, and at proper seasons of the year.
5. And not to cut down timber.	5. And also will not at any time, during the said term, hew, fell, cut down or destroy, or cause, or knowingly permit or suffer to be hewed, felled, cut down or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs, or firewood, or for the purpose of clearance as herein set forth.
6. And that the said (*lessor*) may enter and view state of repair, and that the said (*lessee*) will repair according to notice.	6. And it is hereby agreed that it shall be lawful for the lessor and his agents, at all reasonable times, during the said term, to enter the said demised premises, to examine the condition thereof, and further, that all want of reparation, that upon such view shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators and assigns will, within three calendar months next after such notice, well and sufficiently repair and make good accordingly.
7. And will not assign or sub-let without leave.	7. And also that the lessee shall not, nor will, during the said term, assign, transfer or set over, or otherwise, by any act or deed procure the said premises, or any of them, to be assigned, transferred, set over or sub-let unto any person or persons whomsoever, without the consent

COLUMN ONE.	COLUMN TWO.
	in writing of the lessor, his heirs or assigns first had and obtained.
8. And that he will leave the premises in good repair.	8. And further, the lessee will, at the expiration, or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor, the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted.
9. Proviso for re-entry by the said (*lessor*) on non-payment of rent or non-performance of covenants.	9. Provided always, and it is hereby expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, or in case of the breach or non-performance of any of the covenants or agreements herein contained, on the part of the lessee, his executors, administrators or assigns, then and in either of such cases, it shall be lawful for the lessor, at any time hereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, re-possess and enjoy, as of his or their former estate; any thing hereinafter to the contrary notwithstanding.
10. The said (*lessor*) covenants with the said (*lessee*) for quiet enjoyment.	10. And the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises, for the term hereby granted, without any interruption or disturbance from the lessor, his heirs, executors, administrators and assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them.

R. S. O. CAP. 119.

(As Amended.)

An Act respecting Mortgages and Sales of Personal Property.

HER Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

REGISTRATION OF CHATTEL MORTGAGES AND SALES OF GOODS WHERE POSSESSION IS UNCHANGED.

1. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, made in Ontario, which is not accompanied by an immediate delivery, and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall, within five days from the execution thereof, be registered as hereinafter provided, together with the affidavit of a witness thereto, of the due execution of such mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy filed purports to be a copy, and also with the affidavit of the mortgagee or of one of several mortgagees or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith and is properly authorized in writing to take such mortgage (in which case a copy of such authority shall be registered therewith).

2. Such last mentioned affidavit, whether of the mortgagee or his agent, shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him.

3. Every such mortgage or conveyance shall operate and take effect upon, from and after the day and time of the execution thereof.

4. In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith for valuable consideration.

5. Every sale of goods and chattels, not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargainee, or his agent, duly authorized in writing to take such conveyance (a copy of which authority shall be attached to such conveyance), that the sale is *bonâ fide* and for good consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and such conveyance and affidavits shall be registered as herein provided, within five days from the executing thereof, otherwise the sale shall be absolutely void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith.

6. In case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances, the time of re-payment thereof not being longer than one year from the making of the agreement, and in case of a mortgage of goods and chattels, for securing the mortgagee repayment of such advances, or in case of a mortgage of goods and chattels for securing the mortgagee against the indorsement of any bills or promissory notes, or any other liability by him incurred for the mortgagor, not extending for a longer period than one year from the date of such mortgage, and in case the mortgage is executed in good faith, and sets forth fully, by recital or otherwise, the terms, nature and effect of the agreement, and the amount of liability intended to be created, and in case such mortgage is accompanied by the affidavit of a witness thereto of the execution thereof, and by the affidavit of the mortgagee, or in case the agreement has been entered into and the mortgage taken by an agent duly authorized in writing to make such agreement and to take such mortgage, and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that such mortgage is executed in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the payment of the amount of his liability for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against such mortgagor, and in case such mortgage is registered as hereinafter provided, the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act.

6a. The affidavit of *bona fides* required by the two preceding sections, may be made by one of two or more bargainees or mortgagees; and no sale or mortgage heretofore made shall be invalidated by reason of such

affidavit being made by one only of several bargainees or mortgagees. 41 Vic. cap. 8, D.

7. The instruments mentioned in the preceding sections shall be registered in the office of the Clerk of the County Court of the County or union of Counties where the property so mortgaged or sold is at the time of the execution of such instrument; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all parties interested therein, or intending or desiring to acquire any interest in all or any portion of the property covered thereby.

8. The said clerks respectively shall number every such instrument or copy filed in their offices, and shall enter in alphabetical order in books to to be provided by them, the names of all the parties to such instruments, with the numbers endorsed thereon opposite to each name, and such entry shall be repeated alphabetically under the name of every party thereto. 20 Vic. cap. 3, sec. 6.

9. In the event of the permanent removal of goods and chattels mortgaged as aforesaid, from the county or union of counties in which they were at the time of the execution of the mortgage, to another county or union of counties, before the payment and discharge of the mortgage, a certified copy of such mortgage, under the hand of the Clerk of the County Court in whose office it was first registered, and under the seal of the said court, and of the affidavits and documents and instruments relating thereto filed in such office, shall be filed with the Clerk of the County Court of the County or union of Counties to which said goods and chattels are removed, within two months from such removal, otherwise the said goods and chattels shall be liable to seizure and sale under execution, and in such case, the mortgage shall be null and void as against subsequent purchasers and mortgagees in good faith for valuable consideration as if never executed.

RENEWAL OF MORTGAGES.

10. Every mortgage, or copy thereof, filed in pursuance of this Act, shall cease to be valid as against the creditors of the persons making the same, and against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee, his executors, administrators or other assigns in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made on account thereof, is again filed in the office of the Clerk of the said County Court of the County or union of Counties wherein such goods and chattels are then situate, with an affidavit of the mortgagee, or one of the several mortgagees, or of the assignee, or one of the several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees (as the case may be, duly authorized in writing

for that purpose, which authority shall be filed therewith, that such statements are true, and that the said mortgage has not been kept on foot for any fraudulent purpose.

10a. The statement and affidavit mentioned in the next preceding paragraph may be in the form given in the schedule to this Act, or to the like effect.

10b. The said statement and affidavit shall be deemed one instrument and be filed and entered in like manner as the instruments mentioned in the said Revised Statute are by section eight thereof required to be filed and entered, and the like fees shall be payable for filing and entering such instrument.

10c. Another statement in accordance with the provisions of the tenth sections of the Revised Statute, chaptered one hundred and nineteen, respecting mortgages and sales of personal property, as amended by the Act passed in the forty-third year of Her Majesty's reign, chapter fifteen, duly verified as required by that section, shall be filed in the office of the clerk of the county court of the county wherein the goods and chattels described in the mortgage are then situate, within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by the said tenth section, or such mortgage, or copy thereof, shall cease to be valid as against the creditors of the persons making the same, and as against purchasers and mortgagees in good faith for valuable consideration, and so on from year to year, that is to say, another statement as aforesaid, duly verified, shall be filed within thirty days next preceding the expiration of one year from the day of the filing of the former statement, or such mortgage, or copy thereof, shall cease to be valid as aforesaid. 44 Vic. cap. 12 O.

11. The affidavit required by the tenth section may be made by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee or any next of kin, executor or administrator of any such assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee, the assignment or the several assignments through which such assignee claims, shall be filed in the office in which the mortgage is filed, at or before the time of such refiling, by such assignee, next of kin, executor or administrator of such assignee.

EVIDENCE OF REGISTRATION.

12. A copy of such original instrument or of a copy thereof, so filed as aforesaid, including any statement made in pursuance of this Act, certified by the clerk in whose office the same has been filed, under the seal of the court, shall be received in evidence in all courts, but only of the fact that such instrument or copy and statement were received and filed according to the endorsement of the clerk thereon, and of no other fact; and in all

cases the original endorsement by the clerk made in pursuance of this Act, upon any such instrument or copy, shall be received in evidence only of the fact stated in such endorsement.

DISCHARGE OF MORTGAGES.

13. Where any mortgage of goods and chattels is registered under the provisions of this Act, such mortgage may be discharged, by the filing, in the office in which the same is registered, of a certificate signed by the mortgagee, his executors or administrators, in the form given in the Schedule hereto, or to the like effect.

14. The officer with whom the chattel mortgage is filed, upon receiving such certificate, duly proved by the affidavit of a subscribing witness, shall, at each place where the number of such mortgage has been entered, with the name of any of the parties thereto, in the book kept under section eight of this Act, or wherever otherwise in the said book the said mortgage has been entered, write the words, "*Discharged by certificate number (stating the number of the certificate)*," and to the said entry such officer shall affix his name, and he shall also endorse the fact of such discharge upon the instrument discharged, and shall affix his name to such endorsement.

15. Where a mortgage has been renewed under section ten of this Act, the endorsement or entries required by the preceding section to be made, need only be made upon the statement and affidavit filed on the last renewal, and at the entries of such statement and affidavit in said book. (43 Vic. cap. 15 O.)

16. In case any registered chattel mortgage has been assigned, such assignment may, upon proof by the affidavit of a subscribing witness, be numbered and entered in the alphabetical chattel mortgage book, in the same manner as a chattel mortgage, and the proceedings authorized by the three next preceding sections of this Act may and shall be had, upon a certificate of the assignee, proved in manner aforesaid.

16a. An authority for the purpose of taking or renewing a mortgage or conveyance under the provisions of the said Revised Statute may be a general one to take and renew all or any mortgages or conveyances to the mortgagee or bargainee.

MORTGAGES AND SALES OF CHATTELS IN UNORGANIZED DISTRICTS.

17. When the personal property mortgaged or sold is within a Provisional Judicial District, then the provisions of this Act shall apply to such instrument with the substitution of "the Clerk of the District Court"

for "the Clerk of the County Court;" and with the substitution of "ten days" for "five days," as the time within which the instrument or a copy thereof shall be registered; but this section shall not apply to any portion of a Territorial District which forms part of a Provisional Judicial District.

18. When the personal property mortgaged or sold is within a Territorial District, then the provisions of this Act shall apply to such instrument, with the substitution of "the Clerk of the first Division Court of the District" for "the Clerk of the County Court," and with the substitution of "ten days" for "five days," as the time within which the instrument or a copy thereof shall be registered.

19. When personal property mortgaged or sold is within the said Temporary Judicial District, then the provisions of this Act shall apply to such instrument, with the substitution of "the Clerk of the County Court of the County of " for "the Clerk of the County Court," and with the substitution of "twenty days" for "five days," as the time within which the instrument or a copy thereof shall be registered.

20. Every instrument executed before the first day of July, one thousand eight hundred and seventy-seven, and which, had it been executed after said day, would require registration under the preceding provisions, shall be registered on or before the first day of January, one thousand eight hundred and seventy-eight, in the manner required by the provisions of this Act, and, thereafter, every such instrument which, under the provisions of this Act, requires renewal, shall, unless duly renewed, become void, in accordance with the provisions of this Act.

21. Nothing in the four preceding sections shall be used to aid in determining whether or not chapter forty-five of the Consolidated Statutes of Upper Canada was, prior to the first day of July, one thousand eight hundred and seventy-seven, in force in any Territorial, Temporary Judicial, or Provisional Judicial District.

FEES.

22. For services under this Act the clerks aforesaid shall be entitled to receive the following fees:

1. For filing each instrument and affidavit, and for entering the same in a book as aforesaid, twenty-five cents;

2. For filing assignment of each instrument and for making all proper endorsements in connection therewith, twenty-five cents;

3. For filing certificate of discharge of each instrument, and for making all proper entries and endorsements connected therewith, twenty-five cents;

4. For searching for each paper, ten cents; and

5. For copies of any document with certificate prepared, filed under this Act, ten cents for every hundred words.

MISCELLANEOUS.

23. All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof, that the same may be thereby readily and easily known and distinguished.

24. All affidavits and affirmations required by this Act shall be taken and administered by any judge or commissioner or other person in or out of the Province, authorized to take affidavits in and for the Courts of Queen's Bench or Common Pleas, or a Justice of the Peace, and the sum of twenty cents shall be paid for each and every oath thus administered. 20 Vic. cap. 3.

25. This Act does not apply to mortgages of vessels registered under the provisions of any Act in that behalf.

INDEX TO TREATISE,

PRECEDENTS, FORMS, ETC.

INDEX TO TREATISE.

A

Abstract, Registrar's—
Should be obtained, when, 32.
Should be divided for convenience, 32.

Agreements—
Care required in drawing, 48.
Advantages and disadvantages of, 49.
Plan of, 62.
Clauses to be inserted in, 63.
Form of. See *Forms.*
For leases. See *Leases—Agreements for.*
Summary of things necessary for, 64.

Adultery—
Bars dower, 101.

Alien—
Under no disability, 4, 13.

Alienation—
Restrictions on, how far good in wills, 232.
Examples of restrictions held good, 232.
bad, 233.

Alimony, 101.

Alteration—
Does not invalidate deed, 27.
Must be made at the time or instrument re-executed, 27.

Assignee—
Original lessor cannot recover rent unless all estate of lessee vests in, 161.
Underlessee not liable as, 161.
Bound if lessee covenants to insure in name of lessor, 161.
When bound by state of account between mortgagor and mortgagee, 163.
When, of mortgage can sue in his own name, 165.
Of leaseholds bound by all covenants which run with land, 168.
Liable for breaches of covenants, but may escape by assigning, 158.

Assignments—
Preliminary, 156.
Differences between sales and, 156.
Of leases, 157, 159.
If no covenant to the contrary tenant may assign, 157.
Covenant not to sublet, not usual in, 157.
Doubtful, if lessee can devise whole term, 157.

B

Bill of Exchange—
Assignment of, 168.

Bill of Sale—
See *Chattel Mortgage.*

Bonds—
What should be searched for, 43.

Boundary—
To a river, what, 89.

C

Capacity—
To contract, how affected, 4.

Cestui Que Trust—
See *Trustees.*

Chattel Mortgage and Bills of Sale—
Objects of Act, 188.
When to be in writing and registered, 45.
Requirements of, under R. S. O. cap. 119, 189.
Bona fides required in, 190.
May be made after judgment, 191.
May be made after Division Court Executions and before seizure, 191.
Does not affect landlord, 192.
Valuable consideration necessary, 193.
Must have sufficient statement of consideration, 193.
Advisable to have debt secured by, payable on demand, 205.
Special points to be observed in, 204.
Rights of mortgagee under, 208.
Rights of mortgagor under, 209.
For sale and mortgage of ships. See *Ships.*

Chattel Mortgage and Bills of Sale Act—
What are goods and chattels within, 194.
Does not apply to vessels, 195.
Are growing crops within, 196.
After acquired goods may be mortgaged on certain occasions, 197.
Requirements of bills of sale under, 198.
Difference between chattel mortgage and bill of sale, 200.
Form of conveyance under, 206.
Certainty required by, 206.

Chose in Action—
What it includes, 167.
Transferable by statute, 167.
Law governing, 168.
Distinguished from chose in possession, 169.
Assignments of, 169.
Effect of donor declaring himself trustee of, 170.
Assignee of, must have beneficial interest in, 170.

n Possession—
What are, 180.
How transferred, 181.
Parol gift will pass without delivery in some cases, 181.

Choses in Possession—*Continued*—
Transferred by deed poll, 182.
What covenants should be asked for, 182.
Deed should contain power to enter, 183.
No habendum in transfer of, 183.

Clauses—
Consideration and receipt, 74.
Not essential to contracts under seal, 74.
Necessary in bargain and sale, 74.

Consideration—
Valuable—Good what, 53.
Failure of, effect, 52.

Contracts—
Subject matter of, 14.
Laws governing, 14.
Authenticity of, 54.
Requiring sealed instrument, 54.
Requiring writing, but no seal, 55.
Not within 17th sec. Stat. of Frauds, 56.
For sale of emblements and of natural products, 59.
Statutory requisites of, 57.
What are void, 50.
What are voidable, 51.

Conveyances—
What included in, 1.
Term not strictly applicable to personal property, 1.
Founded on Contract, 2.
Required to be in writing and sealed, 2.
How affected by Stat. of Uses, 78.
Advantages of Short Forms of, 19.

Conveyancing—
Scope of treatise, 1.

Copyright—
Assignment of, 173.
Where recorded, 173.

Coporations—
Grant by and to, 6.
Mortgages by, 6.
Contracts of, under corporate seal, 7.
When corporate seal not necessary, 7.
How capacity to contract restricted, 4.

Covenants—
From municipal corporations, 7.
From limited owners, 8.
From trustees, 7.
Effect of, 17-19.
Difference between those under and those not under the Statute, 18.
No particular words necessary in, 92.
When recitals equivalent to, 93.
Extent of, 93.
Personal, value of, 163.
Usual in freehold, 94.
Usual in leases, 110.
Free from encumbrance
Does not include arrears of taxes, 96.
Further assurance
Extent of, 96.

Covenants—*Continued*—
Quiet possession, 94.
Breach of, what, 95.
Production
Extent of, 97.
When allowed, 98.
Release all claims
Of no special value, 98.
When omitted in England, 98.
For title
Benefit of, runs with land, 94.
Absolute owner must give, 94.
Must be entered into with grantee to uses, 94.
Not to assign
Does not affect under lease, 157.

Crown—
Source of ownership, 4.
Absolute owner, 5.
Takes when no other owner, 5.
Principles of escheat to, 5.
No escheat from corporation unless defect in title, 5.
Conveys by open letter, 5.
Grants how construed, 5.
Never gives covenants, 5.
Represented by Lieutenant-Governor in this Province, 5.
Ultimus hæres, when, 86.

Crown Grant—
Not generally searched, 34.
Instruments for search, 34.
When consent of husband dispensed with, 34.

D

Date—
Not necessary but convenient, 20.
Sunday not proper date, 20.

Decree—
Of Court does not warrant title, 40.

Deed—
May be executed by attorney, 23.
Consummated by delivery, 23.

Delivery—
What is, 25.
Deed takes effect from, 25.

Description—
Registered plan must be referred to in, 86.
If particular, differs from crown the latter prevails, 88.

Discharge—
Conditions of, 67.

Dower—
Vendor agreeing to convey must convey free of, 28.
When abatement in purchase money on account of, 28.
An encumbrance during husband's life, 28.
Proper mode if wife will not bar, 29.
Who are entitled to, 99.

Dower—*Continued*—
Not barred by sale under execution of husband's estate, 99.
Sale for taxes bars, 99.
None in joint tenancy, 100.
Examination and certificate necessary if release from, seperate from conveyance, 100.
Widow may elect as to, 100.
Adultery bars, 101.
None in wild lands, 101.
Wife of mortgagor should join as party to mortgage, 151.
Effect of bar by wife in mortgage, 151.
When bar of, dispensed with by court, 151.
Attaches, if the husband seised of an estate in fee, 152,
Act, 152.

Duplicate—
Not necessary but usual and convenient, 20,
Value of registrar's certificate on, 21.

E

Easements—
Defined, 89.
Pass under general grant, 89.
How conveyed, 90.

Election—
Widow may elect between annuity and dower, 100.

Emblements—
What are, 180.

Encumbrances—
See *Liens, Bonds, Writs, etc.*

Entail—
General—Special—*Quasi*, 84.

Equitable Estate—
Vested by contract of sale, 104.

Escheat—
Effect of, 5.
None from a corporation, 5.

Escrow—
What is, 25.

Estate Tail—
Words necessary to constitute, 84.
Legal incidents of, 85.

Execution—
What is sufficient, 21.

Executors—
Who should be appointed, 228.
Have nothing to do with real estate, 228.
And trustees should be same persons, 229.
Duties of, 250.

F

Fee Simple—
Limitation of, 85.
Incidents of, 85.
Words "successors" necessary in grants to corporations, 85.
Use of how limited, 85.

Feoffment
Definition of, 77.
No. in estates in remainder, 77.
By deed, 77.

Fixtures—
What are, 180.

G

Grant—
Difference between, and mortgage, 18.
Grant and feoffment, 77.
Nature of, 80.
Interests usually comprised in a grant of land, 80.
Cannot commence *in futuro*, 81.
To corporations, guided by charter, 4.

Grantees—
Whom the term should include, 4.
Restrictions of as to estates accruing by marriage, 4.
Aliens can be, 4.
Should be parties to grant, 4.

Grantors—
Title describes who are, 3.
See *Parties*.

Guardian—
Of infant cannot lease, 10.

H

Habendum—
Definition of, 90.
What intended to define, 90.
Must correspond with grant, 90.
When void in deed, 91.
Grant not strengthened by, 91.
Object of, 92.
Declares trusts in, 92,
In leases, 119.

Heir—
Ultimus hæres, 86.

Hereditaments Incorporeal—
What are, 55.
How assigned, 55.

Husband—
Power of, over wife's interests in estates of inheritance, 8.

I

Idiot. See *Lunatic*.

Infants—
Conveyance by, when voidable, 9.
Disability of as regards sale, 9.
When grantor bound in sales to, 9.
Statutory regulation as to estates of, 10.
When estates of, sold by court, 10.

Insolvency—
On conveyance in, provisions of the Act must be complied with, 42.

Instruments—
Who must be parties to, 4.
Erasures in, 22.
Not properly deeds until seals put on, 24.

Interest in Land—
What is an, 57.

Interest—
When, on purchase money, 103.
Law regarding, in mortgages, 145.
And see *Mortgages*.

L

Lapse—
How prevented, 230.

Leasehold Property—
Assignment of, must be in writing, 59.

Leases—
Preliminary remarks on, 105.
Definition of, 105.
Main features and difficulties in, 106.
Peculiarities in, of goods and chattels, 214.
How made, 108.
Effect of Statute of Frauds on, 108.
Advantages of written over parol, 109.
Parol, cannot commence *in futuro*, 109.
Essential parts to all, 113.

Leases, Parol—
Cannot commence *in futuro*, 114.
Lessor not bound to give possession under, 114.
General disadvantages of, 114.

Leases by Deed—
Remarks on short forms of, 118.
Habendum in, 119.
Reddendum in, 119.

Leases, Agreements for—
Must be in writing, signed, 109.
Suggestions for drawing, 110.
Covenants to be inserted in lease should be specified in, 110.
Void leases as, 111.

Leases, Covenants in—
To whom they apply, 120.
To pay rent. See *Rent.*
Binds lessee, executors and assigns, 120.
Rent incident to the reversion, 121.
Binding even if premises burnt unless stipulation to the contrary, 121.
Amount must be certain, 121.
Must be reserved to lessor, not to a third party, 121.
Six years' arrears may be sued for, 122.
Rent not barred until after ten years, 122.
Apportionable in respect of time, 122.
To pay taxes, 122.
What included in, 122.
To repair, 123.
Extent of, 123.
To keep up fences, 124.
Not to cut timber, 124.
What included in, 124.
To enter and view state of repair, 124.
To leave in good repair, 124.
What is performance of, 124.
Not to assign or sublet without leave, 125.
Effect of, 125.
Words to be used in, 125.
Quiet enjoyment, 127.
Meaning, effect of, 127.
Proviso for re-entry, 127.
Importance of, 127.

Legacies—
Charged on land are a lien, 38.

Legal Estate—
Vested by formal conveyance, 104.

Lessee—
Obligations of, 116.
Rights of, 117.
May sublet unless prohibited by lease, 125.
Bound to tender rent to lessor, 122.
See *Leases, Covenants in.*
Has legal right to be indemnified against holder of lease on breach of covenant, 107.

Lessor—
Title of, not so important as in England, 106.
Must verify title, 106.
Cautions regarding title of, 107.
Cannot make lease binding on mortgagee, 107.
Obligations of, 114.
Rights of, 115.
Must demand rent before he can re-enter for non-payment, 129.

Liens—
What, in Canada, 43.

Life Estate—
Incidents of, 81.
At Common Law cannot commence in future, 81.
Conveying words in, 80.
Waste in, what is, 83.

Lis-pendens—
Policy of the courts as regards, 41.
Certificate of dismissal of, should be filed, 41.

Livery of Seisin, 77.

Lunatics—
What classes the term includes, 10.
When, can contract, 11.
Proof of sanity when required, 11.
Proof of insanity when required, 11.
Law as to contracts with men of doubtful mind, 12.
Sale to, when not good, 12.
Registrar executes conveyances for, 12.

M

Market Overt—
Meaning of, 185.

Marriage Settlement—
Must appear to be in lieu of dower, 100.
When not a bar to dower, 100.

Married Women—
Cannot dispose of legal estate unless husband consenting, 8.
Equitable estate of, 9.
Can execute deed alone, when, 8.

Mechanics' Lien—
Duration of, 41.

Merger—
Of written agreement and deed, 67.

Misdescription—
A ground for compensation, 70.

Mistake—
No relief in mistake of law, 51.
Law as regards in extenso, 52.

Mortgage—
Definition of, 133.
In what different from sale, 134.
Statutory form for R. S. O. cap. 104, 134.
Words used in, of leaseholds, of chattels, 134.
Of chattels, how made, 134.
Of land, what it contains, 134.
Security for advances under, 135.
Personal covenant in value of, 136, 144.
Securities classified, 138.
Assignee of, in same position as assignee of promissory note, 165.
Short forms of—
Resume of, 139.
Difference from deed of grant in covenants, 140.
Value of proviso, as to possession, 141.
Estate clause in, 142.
Recitals in value of, 142.
Proviso for redemption in, 143.
Effect of discharge, 143.
Discharge of—
By what Statute effected, 153.
Certificate must be registered, 154.
Effect of, before registration, 154.
When legal estate revested, 154.
When married woman can give, 154.
Absence of subscribing witness, no objection, 154.

Mortgage—*Continued*—
Purchase of—
When subject to existing equities even without notice, 163.
Assignment of—
Three things to be noticed in, 165.
Two things to be considered by assignee, 163.
Mortgagor ought to be a party to, 163.
Subject to equities as between original parties, 163.
Proper words in, to pass land and tenements, 166.

Mortgagee—
How limited as to purchase of estate in default of payment, 143.
If dead before payment personal representative entitled to the money, 144.
Cannot purchase at his own sale, 148.
In Possession—
Cannot transfer his securities without consent of mortgagor, 163.
Difficulties attending the case of, 164.
When not a mortgagee in technical sense, 164.
Decisions as to transferring mortgage without collateral securities, 165.
Entitled to possession, when, 153.

Mortgagor—
Rights of, 165.
Ought to be a party to assignment, 166.
Gives absolute covenants for title, 147.
In possession not liable for rents or profits, 152.
When entitled to possession, 152.
Entitled to tender discharge to mortgagee for execution, 155.
If in possession without proviso is tenant to mortgagee, 153.
Entitled to surplus after mortgagee paid, 149.

N

Notice to Quit—
In tenancy from year to year, half year necessary, 129.
In monthly holding, 129.
Not necessary to a tenancy at will, 129.
Parol sufficient when, 129.
Must be directed to tenant, 130.
May be sent by post, 130.

O

Owner—
Investigation of title discloses, 3.

P

Parties—
Questions as to, 3.
Who must be, 3.
Agent or attorney should not be, 3.
Should not be witnesses, 26.
See *Corporation, Alien, etc., etc.*

Patent—
Mode of conveyance by crown, 5.
Construed in favor of grantee, 5.
Matter of record, 6.

Patents—
Assignable by written instrument, 173.
In Canada assignment must be by deed, 174.
Where registered and with whom, 173.
Extent of assignment of, as against assignor, 173.

Policies of Insurance, 175.
Company must consent to assignment of, 175.

Power of Leasing—
Must be executed by party named, 148.

Power of Sale—
Statutory, 147.
Mortgage valid without, 147.
Cannot be exercised by any one not within the wording of the mortgage, 147.
Word assigns should never be omitted, 147.
Advertisement not absolutely necessary under, 148.
Mortgagee may sell pending suit to redeem, 148.
Does not authorize partition or exchange, 149.
When executors personally liable conveying under, 149.

Power of Sale Statutory—
When used, 150.
Given, Ontario Statute's 1879, 150.
Difference of sale under and in pursuance of power in mortgage, 150
When it will be used, 151.

Probate—
Decides what, 38.
Regulations respecting, 248.
Papers necessary for, 249.
Better evidence than will, 250.
When issued, executor may act safely, 250.
Fees payable on, 249.

Promissory Note—
Assignment of, 168.

Property—
Difference between transfer of real and personal, 176.
Divisions of property, 177, 180.
How formerly divided, 178.
Corporeal—incorporeal, what, 178.
Real, why so-called, 179.
Personal, why so-called, 179.
Distinctions between real and personal, 179.

Personal Property—
Divisions of, 180.
See *Choses in possession*.
See *Choses in action*.
Difference between title of and realty, 44.
What constitutes title to, 45.

R

Real Property—
Lex loci rei sitæ governs, 14.
When English Law of, introduced here, 14.
Difference in transfer of, in England and in Canada, 15.

Recitals—
Where found, when useful, what contained in, 20.
Narrative—introductory, 72.
In what deeds necessary, 72.
When they amount to estoppel, 73.
May not be conclusive as to facts, 74.
Erroneous may not bind party claiming, 74.

Redemption—
Proviso for, 143.

Reddendum—
In lease, 119.

Re-entry—
Positive covenant required to warrant a right of, 127.
Most important reasons for proviso, 127.
Time for, 127.
Formal demand not necessary, 128.

Registration—
Why necessary, 28.
What leases require under Registry Act, 29.
In sales for taxes deed must be registered within six months, 29.

Rent—
Incident to reversion, 121.
Cannot be reserved out of incorporeal hereditaments, 121.
Must be certain, 121.
Limit to restraint for, 122.
Accrues due from day to day, 122.

S

Sale—
Of land—
Preliminary, 69.
All particulars to be inserted in deed, 69.
In, growing crops go with freehold, 70.
Of Personalty—
What necessary to at common law, 183.
Consideration required, 184.
No writing necessary at common law, 184.
What may not be sold, 184.
When warranty will be implied, 185.
Where vendor has had title, 185.
Covenant for title should be express, 186.
Covenant implied in, 186.
Provisions statute of frauds respecting, 186.
Provisions, Lord Tenterden's Act respecting, 186.
Confirmed by lapse of time—
Ratification of, must be in writing and signed, 9.
Conditions of, 65.
Specified, 66.

Seal—
Not necessary to place finger on, 23.
Should be put on before attempted execution, 24.
What is a sufficient seal, 24.
Corporate, must be affixed by agent authorized, 25.

Searches—
To be made before mortgage or sale of personalty, 46.
Real estate, 32, 46.

Securities—
Consolidation of, 164.
Distinguished from tacking, 164.

Signature—
Not essential to a deed, 22.

Ships—
Number of legal owners limited, 211.
Ownership of must be registered, 211.
Defined by 36 Vic., cap. 128, 211.
How transferred, 211.
Not required to be registered, how transferred, 212.
Provisions respecting mortgages of, 213.

Short forms of Conveyancing—
Authority for, 71.
Act respecting, 17.
Value of, 17.
Capabilities of, 16.
Advantages of, 19.

Statutes—
27 Henry VIII., cap. 10; 74, 79, 80, 81, 92.
32 Henry VIII., cap. 28; 81.
cap. 34; 160.
Statutes of Elizabeth, 191.
29 Car. II., cap. 3; 54, 59, 63, 67, 108, 189, 190, 195.
cap. 3, sec. 4; 55, 57, 133, 187, 196.
cap. 3, sec. 17; 46, 56, 186, 187, 196.
cap. 24; 225.
4 Geo. II., cap. 28; 115, 116, 117.
cap. 28, sec. 5; 122.
9 Geo. II., cap. 36; 6, 22, 23, 28, 29, 231, 233.
11 Geo. II., cap. 19; 116, 117.
5 Geo. III., cap. 17; 81.
9 Geo. IV., cap. 14, sec. 7; 186, 189.
4 William IV., 99, 152.
4-5 William IV., cap. 22; 120.
5-6 Vic., cap. 108; 81.
8-9 Vic., cap. 106; 77.
15-16 Vic., cap. 24, sec. 1, (Imp.); 243.
17-18 Vic., cap. 36, (Imp.); 195.
cap. 104, (Imp.); 211, 212, 213, 214.
cap. 43; 81.
18-19 C. S. C., cap. 41; 212, 213.
cap. 63; 5.
23-24 Vic., cap. 145; 151.
25-26 Vic., cap. 63; 214.
29 Vic., cap. 21; 5.
30-31 Vic., cap. 3, (Imp.); 253.
33 Vic., cap. 36 D.; 175.
33-34 Vic., cap. 35; 120.
35 Vic., cap. 12, O.; 167.
cap. 26; 173.
cap. 26, sec. 22, D.; 173.
36 Vic., cap. 6; 43.
cap. 128, D.; 211, 213.
cap. 128, sec. 2; 214.
cap. 128, sec. 4, D.; 211.
cap. 128, sec. 7, D.; 212.
cap. 128, sec. 15, D.; 211.
cap. 128, sec. 22, D.; 211.
cap. 128, sec. 36, 37, D.; 213.

Statutes—*Continued*—
36 Vic., cap. 128, sec. 38, D.; 213.
cap. 128, sec. 39, D.; 213.
cap. 128, sec. 40. D.; 213.
cap. 128, sec. 41, D.; 213.
38 Vic., cap. 88, sec. 16, D.; 173.
cap. 88, sec. 18. D.; 172.
R. S. O., cap. 26; 225.
cap. 40, sec. 49; 128.
cap. 73-74; 168.
cap. 55. sec. 35; 101.
cap. 93; 43.
cap. 94; 254.
cap. 95; 43, 75.
cap. 97; 4.
cap. 98; 54, 69, 77.
cap. 98, sec. 1; 1, 58.
cap. 98, sec. 1, sub.-sec. 2; 77.
cap. 98, sec. 2; 77, 78, 91.
cap. 98, sec. 3; 77.
cap. 98. sec. 4; 58.
cap. 98, sec. 6; 79.
cap. 98, sec. 8; 254.
cap. 98, sec. 10; 26.
cap. 98, sec. 10-11; 255.
cap. 100; 85.
cap. 102; 17, 71, 139.
cap. 102, sec. 4; 71.
cap. 103; 17, 18, 118, 120.
cap. 104; 14, 104, 134, 139, 198.
cap. 104, sec. 4; 139.
cap. 106; 224.
cap. 106, sec. 7; 226.
cap. 106, sec. 8; 247.
cap. 106, sec. 9, sub-sec. 1: 225.
cap. 106, sec. 9, sub-sec. 4; 225.
cap. 106, sec. 10; 225.
cap. 106, sec. 11; 245.
cap. 106, sec. 12; 221, 244.
cap. 106, sec. 14; 245.
cap. 106, sec. 17; 241.
cap. 106, sec. 18; 241.
cap. 106, sec. 19; 241.
cap. 106, sec. 20; 246.
cap. 106, sec. 21; 246.
cap. 106, sec. 22; 246.
cap. 107; 251, 255.
cap. 107, sec 17; 122.
cap. 108, sec. 5; 43.
cap. 109; 20, 33, 38, 72, 97.
cap. 109, sec 1; 76.
cap. 111; 27, 29, 86, 153.
cap. 111, sec. 37; 21, 29.
cap. 111, sec. 44; 27.
cap. 111, sec. 48; 27.
cap. 111, sec. 67; 143.
cap. 111, sec. 75; 247.
cap. 111, sec. 76; 29.
cap. 111, sec. 81; 103.
cap. 111, sec. 82; 88.
cap. 116; 127, 160, 194.
cap. 116, sec. 7; 165, 167, 168.

Statutes—*Continued*—
R. S. O., cap. 116, sec. 8; 256.
cap. 116, sec. 11; 186.
cap. 116, sec. 13; 194.
cap. 119; 47, 177, 188, 189, 193, 196, 209, 213.
cap. 119, sec. 5; 45.
cap. 119, sec. 23; 206.
cap. 119, sec. 26; 213.
cap. 121, sec. 1; 194.
cap. 124; 255, 256.
cap. 125; 255.
cap. 126; 101, 152, 256.
cap. 126; sec. 3; 101.
cap. 127; 8.
cap. 128; 256.
cap. 128, sec. 4; 122.
cap. 129; 256.
cap. 130-131; 256.
cap. 132; 256.
cap. 135; 256.
cap. 136, secs. 2-3; 118, 122.
cap. 136, sec. 8; 121.
cap. 136, sec. 9; 116.
cap. 136, sec. 10; 117.
cap. 136, sec. 11; 117.
cap. 136, sec. 15; 118, 129.
cap. 165; 194.
cap. 167; 254, 255.
cap. 168; 255.
cap. 170; 255.
cap. 171; 255.
cap. 172; 55.
cap. 189, sec. 7; 20.
cap. 216; 255.
cap. 230, sec. 4; 123.
41 Vic., cap. 8; 119, 200.
cap. 8, sec. 5; 201.
cap. 25; 255.
cap. 65; 172.
42 Vic., cap. 20; 150, 152.
cap. 20, sec. 4; 150.
cap. 20, sec. 9; 150.
cap. 20, sec. 10; 150.
cap. 22; 152, 256.
cap. 22, sec. 14; 174.
cap. 22, sec. 25; 174.
cap. 29; 255.
cap. 36; 255.
cap. 45 D.; 171.
43 Vic., cap. 22, sec. 45 D.; 194.
cap. 42 D.; 145, 146.
cap. 42, secs. 1-2 D.; 145.
cap. 14 O.; 90.
cap. 16 O.; 132.
44 Vic., cap. 13 D.; 256.
cap. 5 O.; 56, 121, 168.
cap. 5, sec. 17 O.; 64, 83, 152.
cap. 5, sec. 17, sub-sec. 6 O.; 171.
cap. 10 O.; 154.
cap. 12 O.; 201.
cap. 14 O.; 101. 141, 151.
cap. 14 O., sec. 1 O.; 152.

Statutes—*Continued*—
44 Vic., cap. 14 O., sec. 2 O.; 152.
cap. 15 O.; 256.
cap. 16 O.; 256.
cap. 16 D.; 194.

Statutes and Statute of Frauds—
4th section, provisions of, 57.
17th section, provisions of, 186.
What is sufficient writing to satisfy 17th sec., 187.
What are goods, wares and merchandise within 17th sec., 187.

Statutes of Mortmain, 6, 15.

Stock Exchange—
Practice of, in England, 172.

Stocks and Shares—
Conditions of assignment of, 171.

Surrender—
In law what, 130.
Express must be by deed, 131.

Surveys—
All subsequent to crown registered, 86.
Collected cases on crown, 86.

T

Tacking—
What is, 164.
Now abolished, 164.

Taxes—
Arrears of—Search to be made for, 44.
Things necessary in sale for, 42.
Who are proper conveying parties, 43.

Tenancy—
At will, 112.
From year to year, 112.
Notice necessary to determine, 112.
Determination of—
By forfeiture, 128.
When lessor loses right to re-enter, 128.
By effluxion of time, 129.
See *Notice to quit.*
See *Surrender.*

Tenant—
Pur autre vie, 81.
For life, 81.
In fee tail, 84.
In fee simple, 85.

Tenement—
What is a, 178.
Why so called, 178.

Testators—
Duties of solicitor who has doubts as to sanity of, 218.
Who may or may not have disposing power, 220.
What is undue influence over, 220.
Disabilities of certain persons as, 224.
Disability of married woman, 230.
See *Wills.*

Timber Marks—
How assigned, 175.

Title —
Paper not generally sufficient, 36.
Caution as to tax deed, 36.
By possession, 37.
Effect of disability—lunacy on, 37.
Must be continuous, 37.
Where adverse party patentee of crown, what necessary, 37.
By will, 38.
By inheritance, 39.
What is sufficient proof to conveyancer of heirship, 39.
By power of sale inquiry concerning notice necessary, 40.
See *vesting order*.
See *lis pendens*.
See *mechanics' lien*.
See *tax title*.
See *personal property*.

Trade Marks and Designs—
Assignable by written instrument, 174.
Registered with minister of agriculture, 174.

Trustees—
Definition of, 7.
Power to convey, 7.
What deeds from, should show, 7.
Same persons should be executors and, 229.

U

Under Lease—
Should be, for whole term less one day, 161.
Should correspond with conditions in original lease, 162.
Covenants in, construed the same as in original lease, exceptions to, 162.

Under-lessee—
Not responsible to first lessor on the covenants, 161.

V

Vendor—
In absence of stipulation must verify abstract at his own expense, 103.
Entitled to interest, from time purchaser should have taken possession, 103.
Lien of, 102.
Taking mortgage loses lien, 102.
Now has no lien for unpaid purchase money, 102.

Vendor and Purchasers Act, 33.
Recitals 20 years old proved by, unless inaccurate, 33.

Vesting Order—
Generally made, when, 40.
What necessary to be proved, when occurs in title, 40.
No covenants in, 41.

W

Waiver—
Effect of, 128.

Waste—
What is, 82.

Wills—
Not an assurance, 1.
Same law for realty and personalty, 2.
Thirty years old prove themselves, 38.
Hints in drawing, 216.
Soundness of mind necessary in making, 216.
Who should draw, 223.
What may be disposed of in, 224.
Speak from death, 225.
Instructions for drawing, 226.
Memo. of contents should contain, what, 227.
Charity bequests and devises in, 231.
Gifts in, to be guarded against, 231.
Restrictions on bequests or devise. See *Alienation*.
Advantage of residuary clause in, 235.
Remarks on form of, 236.
Paper held sufficient in form, 236.
Advisable to have attestation clause, 240.
Points to which attention should be paid, 240.
Requirements as to execution of, 241.
Witnesses to, who should not be, 241.
Seal generally unnecessary in, 242.
Signature to, what sufficient, 243.
Witnesses should sign, but need not see testator sign, 245.
How revoked, 246.
Need not be registered, 247.
Probate of. See *Probate*.

Wills Act—
Wills defined by, 225.

Witnesses—
One generally sufficient, 23.
When two necessary, 22, 26.
Qualifications of, 26.
May be compelled to prove execution of deed, 27.
To wills, 241.

Writs—
Should be searched in sheriff's office, 44.
What sheriff's certificate of, should show, 44.

INDEX

TO THE

PRECEDENTS, FORMS AND REFERENCES.

A

Abstracts (Solicitors)—
Arrangement of deeds in, 267.
Births, marriages and deaths, 267.
Consideration in deeds, 267.
Execution and attestation of deeds, 268.
General words in deeds, 268.
Habendum, " 268.
Intestacy how noticed, 268.
Memoranda what noticed, 268.
Names of parties, additions, etc., 267.
Parcels, 267.
Powers, etc., 267.
Proceedings in the High Court of Justice, 268.
Provisos and conditions, 268.
R. S. O., cap. 109, as to titles, 268-9.
Receipt clause, 268.
Reddendum, 268.
Statement of facts to accompany, 268.
Testatum clause, 267.
Title by possession, 269.
Wills, 268.

Affidavit—
Bills of sale—Bargainee, 305.
Chattel mortgages—Mortgagee, 307.
Free grants, location, etc., 276-7-8.
Registration of deeds, 265.
wills, 266.

Agreement—
Formal parts, 270.
Mortgage, 271.
Sale of land, 270.
conditions of sale, 273.
Recital of, 262-3.
to accept composition, 261.

Alienation—
Restrictions as to the free grants, 274-5.
What interests in land capable of, 274.

Aliens—
(See *Under Naturalization*).

Appraisement, 286.
See *Under Distress.*

Assignments—
Choses in action, 298.
Copyright, 298.
Interim, 299.
General form, 294.
Industrial designs, 301.
Leaseholds, 294.
recitals of, 262.
Mortgages—Land, 296.
—Chattels, 297.
Patent—Before issue, 300.
After issue, 300.
Surrender of, 300.
Statutes affecting, 294.
Timber marks, 302.
Trade marks, 301.

Attestation—
By an Attorney, 263.
a blind person, 263.
corporation, 266.
deaf and dumb party, 264.
Marksman, 264.
In abstracts, 268.
codicils, 312.
deeds, 263.
wills, 311.

Attorney—Power of—
Attestation clause, 263.
Testimonium, 264.

Auctions—
Statute law as to, 271.
Recital—Sale by, 259.

B

Bailiff's Sale—
Appraisement, 286.
Appraiser's oath, 286.
Distress warrant, 285.
Inventory, 287.
memo. endorsed, 287.
Notice of sale, 287.

Bills of Sale—
Affidavit of bargainee, 305.
Form under R. S. O., cap. 119, 304.

C

Chattel Mortgages—
(See *Mortgages*).

Chose in Action—
Assignment of, 298.

Codicil to Will, 312.—
Recital—Not affecting devise, 262.

Composition—
Recitals—Agreement to accept, 261.
Inability to pay debts, 261.

Conditions of Sale—
Agreement appended to, 273.
Conditions used by High Court, 272.
Special conditions, 273.
Statute law as to, 271.

Conveyances—
Statutory—Chattels, 304.
Leaseholds, 283.
Mortgages, 288.
Sales, 279.

Corporations—
Attestation, 254.
Declaration under R. S. O., cap. 167, 254.
Execution for purposes of registration, 266.
Mortmain Acts, 281.
Recitals Mechanics' Institute, 262.
R. S. O., cap. 167, 263.
Testimonium clause, 264.
Mechanics' Institute, 265.
Religious Institutions, 266.

Covenants—
Assignable 283.
In abstracts, 268.
assignment of chattel mortgages, 297.
choses in action, 298.
leaseholds, 294.
mortgages, 296.
bills of sale, 304.
chattel mortgages, 306.
conveyances by executors, 280.
married women, 281.
under power of sale, 279, 280.
gifts of personal property, 303.
leaseholds in statutory lease, 283.
mortgage of freeholds, statutory, 288.
mortgage of leaseholds, 283.
sales of land, statutory, 279.
surrender of lease, 287.
under lease, 285.
Usual, added in statutory lease, 284.

Crown, 253, 254.

D

Declaration of Incorporation—
Under the Act respecting benevolent and other societies, 254.

Devise—
Residuary clause, 312.
on condition, 311.
Specific bequests, 311.
Trust estates, 312.

Discharge of Mortgages—
Chattels, 309.
Land, 292.
partial, 293.

Distress Warrant—
(See *Bailiff's sale*).

E

Executors and Trustees—Appointment in Wills, 311.
Recitals—Sale, 259.
Purchase, 259.
Sales by, 280.
Statutes affecting, 255.

F

Free Grants—
Act applies only to men, 275.
Affidavits—Location, 276.
children, 277.
Issue of patent, 278.
Summary of the Acts, 275.

G

Gifts—Choses in possession, 303.

H

Husband and Wife—
Conveyances by married women, 281.
inter se, 281.
Recitals—as to living separate, 262.
Statutes affecting, 255-6.

I

Industrial Designs—
Forms as to, 301.

Infants—
Guardianship—Marriage, etc., 256.
Ratification of promises, 256.

L

Leases—
Appraisement, 286.
Appraiser's oath, 286.
Assignment of lease, 294.
recital of, 262.

Leases—*Continued*—
Bailiff's sale, 287.
Claim as to renewal, 284.
Covenants as to bankruptcy, etc., 284.
seizure or execution, 284.
Distress warrant, 285.
Inventory, 286.
Memo. to be endorsed on inventory, 287.
Notice to claim double rent, 285.
quit (landlord), 285.
(tenant), 285.
Recital of lease, 261.
Statutes affecting, 283.
Statutory lease, 283.
Act respecting, 283.
Surrender of lease, 287.
Underlease, 284.

Leaseholds—
Mortgage of, 289.
Assignment of, 294.

Letters of Administration—
Recital of, 216.

M

Majority—
Recital of, attaining, 260.

Marriage—
Intended marriage, 261.
Recital of, 260.

Married Women—
Conveyances by, 281.
Discharges of mortgages by, 288.
Statutes affecting, 255-6.

Mortgages (*Chattels*)—
Affidavit of Mortgagee, R. S. O., cap. 119, 307.
Assignment of, 207.
Conveyance, 306.
endorsemnt, 308.
future advances, 309.
Discharges, 309.
Renewals, 309.
Statutes respecting, 304.
Vessels, 310.

Mortgages (Land)—
Agreement for, 271.
Assignment of, 296.
Discharge of, 292.
in part, 293.
Leaseholds, 289
Notice of sale, (Statutory), 291.
(Short), 292.

Mortgages—
Recitals as to state of debt, 259.
of, 261.
Statutes affecting, 288.
Statutory mortgage, 288.
Statute, short forms, 315,

N

Naturalization, 256.
Certificate, 258.
Oath of allegi·nce, 257.
residence, 257.
service, 257.
Notice—
Sale by bailiff for rent, 287.
Sale in mortgage—statutory, 291.
Sale, short notice, 292.
To claim double rent, 285.
quit (landlord), 285.
(tenant), 285.

P

Parties—
Aliens, 256.
(See under *Naturalisation*).
Corporations, 254.
Crown, 253, 254.
Husband and wife, 255, 256.
In abstracts, 267.
Infants, lunatics, etc., 256.
Trustees and executors, 255.
Patent—
Assignment after issue of, 300.
of entire or half interest in, 300.
Recital of letters patent, 262.
Surrender of, 300.
Personal Property—
Affidavit of bargainee under R. S. O. cap. 119, 305.
mortgagee under R. S. O. cap. 119, 307.
Bill of sale under R. S. O. cap. 119, 304.
Chattel mortgage under R. S. O. cap. 119, 304.
Chattel mortgage (endorsement) under R. S. O. cap. 119, 308.
(future advances) under R. S. O. cap. 119, 309.
statement for renewal under R. S. O. cap. 119, 309.
Discharge of chattel mortgage, 309.
Gift choses in possession, 303.
Sale of goods, 303, 304.
Vessels (sales and mortgages), 310.
Power of Sale—
Conveyances under, 279, 280.
Recitals, 260.
Powers—
Execution of, 268.
In abstracts, 267.
Probate—
Recital, 260.
Renunciation—recital, 259.
Provisos and Conditions—
In abstracts, 268.
chattel mortgages, 306.
endorsement, 308.
leases, 284.
mortgages, 288.
mortgage of leaseholds, 289.

R

Recitals—
Agreement for a sale of land, 263.
partnership, 263.
husband and wife to live apart, 262.
Agreement to accept composition, 261.
Assignment of judgment debts, 263.
Attaining majority, 260.
Codicils not affecting devise of realty, 262.
Contract for loan, 262.
sale, 262.
Conveyance in trust for sale, 261.
Conveyances under the benevolent, provident and other societies, 263.
Execution of purchaser conveying, 259.
Inability to pay debts, 261.
In abstracts, 267.
Intended marriage, 261.
Lease, 261.
Letters of administration, 261.
Letters patent, 262.
Marriage, 260.
Mortgage, 261.
Power of sale, 260.
Power to appoint new trustees, 260.
Probate, 260.
Purchaser bought as trustee, 259.
Renunciation of probate, 259.
Sale by auction, 259.
Sale etc. by Mechanics' Institute, 262.
State of mortgage debt, 259.
Valuation, 259.

Registration—
Affidavit for deeds, 265.
wills, 266.

Renewal clause—
In leases, 284.

Residuary clause, 312.

S

Sales of goods—
Bill of sale affidavit R. S. O., cap. 119; 304-305.
By bailiff. See bailiff's sale, 285.
Gift choses in possession, 303.
Vessels, 310.

Sales of land—
Act respecting short forms, 314.
Agreement for, 270.
Contract for recital, 262.
Conveyance by corporations, 281.
executors, 280,
husband to wife and *vice versa*, 281.
married woman, 281.
mortmain acts, 281.
in trust for recital, 261.

Sales of land—*Continued*—
Conveyances not under the statute, 279.
not under power of sale, 279.
usual form, 280.
Free grants, 274.
Affidavits for issue of patent, 278.
location, 276.
where children, 277.
Summary of act respecting, 275.
'Land' means, 274.
Statutory deed of conveyance, 279.
What interests in land may be sold, 274.

Statutes, references to—
Administrators, 255.
Aliens, 256.
Assignments, 294-297.
Copyrights, 298.
Industrial designs, 301.
Patents, 300.
Timber marks, 302.
Trade marks, 301.
Auctions, 271-272.
Bar of dower, 288.
Bills of sale and chattel mortgages, 304.
Burial societies, 255.
Cemetery companies, 255.
Chose in action, 298.
Conditions of sale, 272.
Copyright, 298,
Corporations,
Benevolent and other societies, how incorporated, 254.
Conveyances by, 254.
Execution by, 266
Covenants running with the land, 283.
Discharges of mortgages, 288.
Dower, 256.
Double rent, 283,
value, 283,
Frauds in sales and mortgages, 272.
Fraudulent removal of goods, 283.
Free grants and homesteads, 274-275.
Husband and wife, 255.
Improvements under mistake of title, 269.
Industrial designs, 301.
Infants, guardians, custody, etc., 255.
Marriage, 255.
Ratification of promise, 255.
Inheritance, 269.
Interest, how stated in mortgages, 288,
Landlord and tenant, 283.
Lands etc. of the crown, 253.
sales of, 274.
Leases, statutory, 283.
written, to be by deed, 283.
Limitations of actions, 269.
Lodgers, goods of, 283.
Marriage of minors, 255.
Married women, 255-256.
bar of dower, 288.
discharge of mortgage, 288.

Statutes, references to—*Continued*—
Mechanics liens, 269.
Mechanics' Institutes, 255.
Merger, 288.
Mortgages of real estate, 288.
short forms of, 288.
chattels, 304.
vessels, 310.
Notice of sale, 291.
Mortmain acts, 281.
Naturalization, 256.
Notice of sale—mortgage, 291.
Overwhelming tenants, 283.
Patents, 300.
Personal property, 302-304.
Power of sale, 288.
Powers, execution of, 255.
Registrations of deeds, wills, 265-266.
Religious institutions, 265.
Sales, chattels, 304.
Land, 274.
Vessels, 310.
Seizure of goods of lodgers, 283.
Set-off as to rent, 283.
Simplifying titles, 268-269.
Timber marks, 302.
Trade marks, 301.
Trustees and executors, 255.
Vessels, sales and mortgages, 310.
Wills, 311.

Statutory Conveyances—
Conveyances and mortgages (appendix), 314-315.
Leases, 283.

Surrender lease, 287.
Patent, 300.

T

Testimonium—
By power of attorney, 264.
Corporations, 264.
Mechanics Institutes, 265.
Ordinary, 264.

Timber marks, 302.

Trade marks, 301.

U

Underlease, 284.

V

Vessels—
Sales and mortgages of, 310.

W

Will—
Abstract of, 268.
Codicil to, 312.
Devise of trust estates 312.
Residuary clause, 312.
Short form of, 311,

Witnessing—
Affidavit for registration deeds. 265.
wills, 266.

THE END.

3 6105 063 148 121